Supreme Court, U.S.
FILED
00.730 NOV -3 2000
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

RODNEY SLATER, Secretary of the United States Department of Transportation, KENNETH WYKLE, Administrator of the Federal Highway Administration, VINCENT F. SCHIMMOLLER, Administrator of Region VIII, Federal Highway Administration, and LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether strict scrutiny may be applied differently to Congress than to other governmental actors?

LIST OF PARTIES

Adarand Constructors, Inc. ("Adarand"), in *Adarand Constructors, Inc. v. Peña*, was Plaintiff before the United States District Court for the District of Colorado, Appellant before the United States Court of Appeals for the Tenth Circuit, Petitioner before the United States Supreme Court, Plaintiff before the United States District Court for the District of Colorado (on remand), and, in *Adarand Constructors, Inc. v. Slater*, Appellee before the United States Court of Appeals for the Tenth Circuit, Petitioner before the United States Supreme Court, and Appellant before the United States Court of Appeals for the Tenth Circuit (on remand). Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The caption of the Petition contains the name of all the parties. Respondents named therein are joined in their official capacities and they, or their predecessors, in *Adarand Constructors, Inc. v. Peña*, were Defendants before the United States District Court for the District of Colorado, Appellees before the United States Court of Appeals for the Tenth Circuit, Respondents before the United States Supreme Court, Defendants before the United States District Court for the District of Colorado (on remand), and, in *Adarand Constructors, Inc. v. Slater*, Appellants before the United States Court of Appeals for the Tenth Circuit, Respondents before the United States Supreme Court, and Appellees before the United States Court of Appeals for the Tenth Circuit (on remand).

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, *Adarand Constructors, Inc. v. Slater, et al.*, 2000 WL 13[illegible]571 (10th Cir.) (Docket No. 97-1304), reversing grant of summary judgment for Adarand granted by the U.S. District Court for the District of Colorado. That Tenth Circuit opinion appears at pages App. 1-97 of the Appendix. The District Court opinion, *Adarand Constructors, Inc. v. Pena, et al.*, 965 F.Supp. 1556 (D.Colo. 1997), appears at App. 128-201.

JURISDICTION

Title 28 U.S.C. § 1254(1) grants this Court jurisdiction to review the Tenth Circuit opinion entered on September 25, 2000.

CONSTITUTIONAL PROVISION INVOLVED

This Petition for *Writ of Certiorari* involves the Fifth Amendment to the United States Constitution. App. 293.

STATUTES INVOLVED

The statutes involved in this Petition include Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act ("STURRA"), 101 Stat. 145-146; Section 1003(b) of the Intermodal Surface Transportation Efficiency Act ("ISTEA"), 105 Stat. 1919; Section 1101(b) of the Transportation Equity Act for the Twenty First Century ("TEA-21"), Pub. L. No. 105-178; and Sections 8(d), 637(d), and 644(g) of the Small Business Act, 15 U.S.C. §§ 637(d), 644(g). App. 294-316.

STATEMENT OF THE CASE

This case began over a decade ago when Adarand Constructors, Inc. ("Adarand") brought suit against the Secretary, and other officials, of the United States Department of Transportation ("US-DOT") challenging federal

statutes that established a federal program under which federal highway construction contracts are awarded on the basis of race. Having already twice reversed decisions by panels of the Tenth Circuit in this case, this Court is familiar with the rudiments of that program and the undisputed facts.

For present purposes it is sufficient to note the following, which this Court set forth in *Adarand v. Pena*, 515 U.S. 200, 204-211 (1995) (*"1995 Adarand"*). The federal statutes compel US-DOT to presume that all members of some races are "socially and economically disadvantaged" and that all members of other races are not. 15 U.S.C. § 637(d)(1-3). The statutes provide that businesses owned by "socially and economically disadvantaged" individuals shall be certified, either by US-DOT or a state, as disadvantaged business enterprises ("DBEs"). 15 U.S.C. § 637(d)(1); *See* 49 C.F.R. § 26.21. The federal statutes also establish a specific, numeric, goal for DBE participation in all federal procurement, *e.g.*, 15 U.S.C. § 644(g), and, through a combination of compulsion and incentives, the statutes enlist private contractors to assist US-DOT in achieving that goal. As to compulsion, the statutes require every private prime contractor, on penalty of being ineligible to win federal contracts, to establish and adhere to a plan to try to hire DBEs as subcontractors. 15 U.S.C. § 637(d)(4-6). As to incentives, the statutes authorize US-DOT to provide money bonuses to contractors who hire DBEs. 15 U.S.C. § 637(d)(4)(E). Finally, the statutes require US-DOT and prime contractors to insert certain clauses, which detail these requirements, into federal highway construction contracts. 15 U.S.C. § 637(d)(1-6).

In this particular case, the central undisputed fact is that, despite being the lowest bidder, Adarand failed to win a subcontract as a result of a government-paid cash bonus that caused the prime contractor, Mountain Gravel & Construction Company ("Mountain Gravel"), to hire one of Adarand's four DBE-certified competitors. Specifically, Congress required Mountain Gravel to try to hire

DBE contractors and US-DOT paid Mountain Gravel an irresistible ten thousand dollar bonus for doing so. US-DOT paid the bonus through a contract mechanism called the Subcontracting Compensation Clause ("SCC").[1] As a result of this stick and carrot arrangement, Adarand lost the West Dolores guardrail subcontract to a competitor, Gonzales Construction Company ("Gonzales"). Adarand is not a DBE. Gonzales is. But for the existence of both the stick (Mountain Gravel's compulsory DBE subcontracting plan) and the carrot (the $10,000 bonus US-DOT paid Mountain Gravel to hire Gonzales), Adarand would have won the subcontract. These facts are not disputed. *Adarand v. Slater*, 120 S.Ct. 722, 724 (2000) (*per curiam*) (*"2000 Adarand"*); *1995 Adarand*, 515 U.S. at 205; *Adarand v. Peña*, 965 F.Supp. 1556, 1559 (D. Colo. 1997) (*"1997 Adarand"*).

There is no dispute, therefore, that Congress and US-DOT treated Gonzales differently than they treated Adarand and did so solely on the basis of the race of their owners. Thus, the issue in this case is whether this mandatory, race-based difference in treatment by the federal government survives the strict scrutiny analysis required by the Equal Protection component of the Fifth Amendment to the United States Constitution.

In 1992, the U.S. District Court for the District of Colorado granted summary judgment to US-DOT and the Tenth Circuit affirmed two years later. In 1995, this Court reversed and remanded, ordering the lower courts to apply "strict scrutiny" to the federal statutes and regulations at issue, rather than the intermediate scrutiny the lower courts had applied. *1995 Adarand*, 515 U.S. at 238-239. On remand in 1997, the District Court held that all the statutes – the ones that set the goals, as well as the

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[1] Contrary to the confusion engendered by the Tenth Circuit panel, the SCC is not the federal program at issue in this case; it is only a small part of the entire federal race-based highway construction contracting program; that is, one mechanism by which that program is implemented.

ones that compel attempts at and create incentives for their achievement – were unconstitutional as applied in this case. *1997 Adarand*, 965 F.Supp. at 1584.

When US-DOT's appeal in this case reached the Tenth Circuit, a panel of that Court held that *Adarand* was moot. *Adarand v. Slater*, 169 F.3d 1292 (1999) (*"1999 Adarand"*). This Court reversed and remanded, ordering the Tenth Circuit to resolve the matter on the merits. *2000 Adarand*, 120 S.Ct. at 726-727.

On September 25, 2000, eleven years almost to the day on which Adarand lost its bid for the West Dolores project subcontract, the Tenth Circuit issued its opinion. A panel of the Tenth Circuit held that the District Court had erred in granting summary judgment to Adarand and reversed. Though the panel declined to consider all elements of this integrated statutory scheme,[2] the panel ruled that 15 U.S.C. § 637(d)(1-3), and the manner in which the panel decided those statutes are now being implemented, all survived "strict scrutiny." First, the panel deemed § 637(d)(1-3) facially constitutional.[3] Second, the panel held that the SCC was unconstitutional as applied at the time of the West Dolores subcontract and for years thereafter. App. at 79. Third, however, the panel held that US-DOT had rectified the one constitutional deficiency of the federal race-based highway construction contracting program – the SCC – by voluntarily abandoning that particular mechanism and by concomitantly instituting a new set of regulations. App. at 58-60. Thus, with the single exception of the voluntarily abandoned

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[2] The panel denied Adarand standing to challenge §§ 8(a), 644(g), and 8(d)(4-6). App. at 14.

[3] The panel stated it would "address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality." App. at 14 (Italics in original, underline added). In addition, since the panel only denied Adarand standing to challenge §§ 8(a), 644(g), and 8(d)(4-6), the implication is clear that the panel held that Adarand has standing to challenge § 8(d)(1-3).

SCC, the panel's holding left the federal race-based highway construction contracting program completely intact.

Adarand now petitions this Court for *certiorari* to review the decision of the Tenth Circuit entered on September 25, 2000.

REASONS FOR GRANTING THE WRIT

I. THE PANEL SET AN INTOLERABLE PRECEDENT BY APPLYING A FAR MORE LENIENT STANDARD OF "STRICT SCRUTINY" TO ACTS OF CONGRESS THAN APPLIES TO THE ACTIONS OF STATE AND LOCAL GOVERNMENTS.

In its 1995 ruling in this case, this Court held that where fundamental constitutional rights are concerned, equal protection analysis requires application of the same standard in all cases, regardless of the unit of government involved. In unmistakable terms, this Court concluded:

> [A]ny person, of whatever race, has the right to demand that *any governmental actor* subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the *strictest* judicial scrutiny.
>
> * * *
>
> Accordingly, we hold today that all racial classifications, imposed *by whatever federal, state, or local governmental actor*, must be analyzed by a reviewing court under strict scrutiny.

515 U.S. at 224, 227 (emphasis added). Properly applied, strict scrutiny requires that any racial classification, by Congress, by a State, or by a local government, must be narrowly tailored to achieve a compelling state interest. 515 U.S. at 235. Having "alter[ed] the playing field" by mandating a far more stringent standard of review than the panel applied in 1994, this Court remanded this case to the lower courts for the application of the self-same "strict scrutiny" test that applies to "any governmental actor." 515 U.S. at 237.

Notwithstanding this Court's clear and repeated elucidation of the "strict scrutiny" test, the panel applied a form of "strict scrutiny" that bears no resemblance whatsoever to the "strict scrutiny" test this Court has applied and ordered the panel to apply. First, the panel discerned a series of "barriers" to minority participation in commerce and it held that eliminating those barriers provided a compelling governmental interest sufficient to support the challenged statutory racial classifications. Those barriers were:

- The tendency of company owners to pass ownership of their companies to members of their families instead of members of minority groups, App. at 34-35;
- The difficulty people with no experience have in joining a union in order to gain the experience needed to compete with established non-minority companies, App. at 35;
- The difficulty of obtaining access to capital in the absence of a credit history or collateral, App. at 35;
- The tendency of prime contractors to work with subcontractors they already trust because they have worked with those subcontractors before, App. at 39-40;
- "Bid shopping," a practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms trying to replace those former subcontractors, App. at 40;
- The inability of new enterprises to obtain bonding because they lack experience, which in turn hampers their ability to gain experience, App. at 41-43; and
- The inability of new market entrants to receive special pricing arrangements from suppliers from whom they have never purchased anything before, App. at 43-44.

Under proper strict scrutiny analysis, these barriers could not possibly justify a statutory racial classification. Thus, although professing to apply "strict scrutiny," the panel failed to demand a strong basis in evidence to support a compelling governmental interest in redressing a deliberate pattern or practice of racial discrimination in which

the federal government had somehow participated. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Second, the panel failed to apply the narrow tailoring prong to the race-based statute. Specifically, the panel failed to demand that the challenged statutory racial classification be a last resort justified only by the absence of race-neutral alternatives; that it include individualized inquiry into each person seeking to benefit by it; and that it have limited duration.

Not only does the panel's decision create an intolerable conflict with *1995 Adarand*, it also creates an intolerable conflict with decisions of other Circuit Courts of Appeals. *See, e.g, Associated Gen'l Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997); *Contractors Associations of Eastern Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 607 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997). This Court must grant the petition to resolve these conflicts.

A. The Panel Vitiated The Strict Scrutiny Requirement That A Statutory Racial Classification Is Not Narrowly Tailored If It Does Not Allow Individualized Inquiry, If Race-Neutral Solutions Were Possible, Or If Its Duration Is Unlimited.

At a bare minimum, to be narrowly tailored a statute that contains a racial classification must meet three criteria. First, this Court established conclusively in *Croson* that narrow tailoring commands Congress to "inquir[e] into whether or not the *particular* [D]BE seeking a racial preference has suffered from the effects of past discrimination" at the hands of the federal government. *Croson*, 488 U.S. at 508 (emphasis added). Quoting this very passage from *Croson*, both courts below recognized that this prohibition against over-inclusiveness is inescapable. App. at 71-72; 965 F.Supp at 1580.

Second, Congress may enact a racial classification only after "consideration of race-neutral means to

increase minority business participation in government contracting." 515 U.S. at 237-238. This Court so held in its 1995 decision in this case. *Id.*

Third, as this Court also stated in this very case, Congress must ensure that the program has a finite duration tailored to the problem at hand. As this Court put it, Congress must ensure that the program "[i]s appropriately limited such that 'it will not last longer than the discriminatory effects it is designed to eliminate.' " 515 U.S. at 237-238 (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

Simply stated, the program must be race-neutral if at all possible; it cannot be over-inclusive; and it cannot go on forever. Notwithstanding these clear directives, the panel eschewed race-neutral solutions that readily present themselves and embraced the race-based classification set forth in the challenged statutes. In so doing, the panel failed to apply all three of these narrow tailoring criteria properly. Instead, the panel allowed administrative difficulty to excuse constitutional infirmity. But administrative convenience is not a constitutionally permissible excuse for a failure to tailor narrowly. As this Court held in *Croson*, "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." 488 U.S. at 508.

1. Since The Challenged Statutory Scheme Prohibits Agencies From Requiring Proof That The Particular DBE Seeking A Racial Preference Has Suffered From Discrimination, The Entire Scheme Is Unconstitutional On Its Face For Want Of Individualized Inquiry.

This Court made clear that a statutory racial classification must provide individualized inquiry into whether each person seeking to take advantage of a race-based preference has suffered the effects of discrimination at the hands of the government in question. *Croson*, 488 U.S. at 508. A program that fails to do so, this Court held, is not narrowly tailored by definition. In fact, this Court deemed it "obvious" that, unless minority entrepreneurs are asked whether each had experienced discrimination in which the government had somehow participated, "[A] [race preference] program is not narrowly tailored to remedy the effects of prior discrimination." *Id.*

Moreover, whereas a statute that fails to require the necessary individualized inquiry may be unconstitutional "as applied," a statute that prohibits such inquiry is unconstitutional "on its face." A statute is unconstitutional on its face when it "[i]s apparent that . . . the statute could never be applied in a valid manner." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797-98 (1984).

Here, the challenged statutes do not just fail to require the constitutional prerequisite of individual inquiry. Instead, they affirmatively prohibit individualized inquiry because the presumption that all members of certain races are disadvantaged is mandatory. 15 U.S.C. §§ 637(d)(1-3). *See also infra*, n.2. Thus, the District Court correctly observed that the challenged statutory scheme:

> [R]equires the following contractual language: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities . . . "

965 F.Supp. at 1562. It also correctly observed that:

> Under both the 8(a) and the 8(d) programs, the race-engendered presumptions of disadvantage may be rebutted if a third party comes forward with evidence that the participant in question is not, in fact, socially or economically disadvantaged. See 13 C.F.R. §§ 124.111(c)-(d) and 124.601-609 (1996). . . . [O]nly third parties may

> come forward to initiate a rebuttal of presumptive disadvantage . . . [;] no such duty falls upon the Defendants or any other governmental entity.

965 F.Supp. at 1565.

Not surprisingly, given the clarity of this Court's holding in *Croson*, other Circuit Courts of Appeals have reached the same conclusion: no statute is narrowly tailored that awards relief, not on the basis of disadvantage suffered as a result of one's race, but on the basis of membership in a racial group. *See Hopwood v. Texas*, 78 F.3d 932, 951 (5th Cir. 1996) ("A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny"); *Philadelphia*, 91 F.3d at 607 ("preference for [D]BEs was shared by an amalgam of minorities, including Hispanics, American Indians, Aleuts, Eskimos, Asians and Native Hawaiians . . . [but] there was no evidence that any of these groups suffered from discrimination [and therefore] . . . the 15% preference for minorities was not a narrowly tailored remedy for past discrimination").

Since the challenged statutes preclude, or at least fail to require, the necessary inquiry, they cannot possibly be "narrowly tailored" unless the strict scrutiny test applies differently to Congress. This Court held that it does not. Because the panel's decision with regard to narrow tailoring creates an intolerable conflict with the holdings of this Court and other Circuit Courts of Appeals, this Court must grant the petition to resolve the conflict.

2. Since The Barriers To Participation In Commerce By DBEs That The Panel Identified Are Easily Susceptible To Race-Neutral Solutions, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored.

The panel deemed the statutes at issue in this case sufficiently narrowly tailored to remedy a series of seven

barriers to minority participation in commerce, detailed in Section I above. Distilled to their essence, they describe the difficulties faced by any new entrant into an established industry, regardless of the entrant's race. Therefore, these factors are precisely the same factors that this Court considered in *Croson* and for which this Court rejected a race-conscious solution. They are nothing but:

> [A] host of non-racial factors which would seem to face a member of any racial group attempting to establish a new business enterprise such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record.

488 U.S. at 498-499. "Under such circumstances," this Court concluded, the solution to such problems must also be race-neutral:

> Many of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race neutral. If [D]BEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation.

488 U.S. at 507. In other words, because race classifications are permissible only in an "extreme case," 488 U.S. at 509, and only when "every constitutional 'i' is dotted and every 't' is crossed," *Engineering Contractors of So. Fla., Inc. v. Metropolitan Dade County*, 943 F.Supp. 1546, 1556 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998):

> [T]he strict scrutiny standard will operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort.

Croson, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment). In fact, a "race conscious remedy will not be narrowly tailored until less sweeping alternatives – particularly race-neutral ones – have been considered *and tried*." *Walker v. City of Mesquite*, 169 F.3d 973, 985 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 969 (2000) (emphasis added); *accord Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997) *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998); *accord, Association for Fairness in Business, Inc. v. New Jersey*, 82 F.Supp.2d 353, 362 (D.N.J. 2000) (finding lack of narrow tailoring in part because there was no evidence New Jersey first actually attempted race-neutral means).

The race-conscious statutory scheme in this case was not a last resort, because surely, as this Court noted in *Croson*, the government:

> [H]as at its disposal a whole array of race-neutral devices to increase the accessibility of [government] contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect.

488 U.S. at 510.[4]

Since a race-neutral solution is available in the present case, only a race-neutral solution can pass muster under proper application of the narrow tailoring prong of strict scrutiny analysis. Consequently, the panel's holding that the statutory presumption of racial disadvantage is

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[4] Presented the opportunity, Congress specifically rejected such race-neutral assistance for all disadvantaged entrepreneurs, opting instead to continue a race-based program to achieve racial diversity and proportionality. *See* 144 Cong. Rec. S1395-S1434 (March 5, 1998); 144 Cong. Rec. S1481-S1496 (March 6, 1998); 144 Cong. Rec. H2000-H2011 (April 1, 1998).

narrowly tailored is unsupportable unless the narrow tailoring requirement means something different when applied to Congress. *Certiorari* is necessary to ensure that the same strict scrutiny test applies in the same way to all governmental actors. *1995 Adarand*, 515 U.S. at 237.

3. Since The Barriers The Panel Identified Have Always Been, And Always Will Be, Common To All Market Entrants, The Challenged Statutory Racial Classifications Cannot Be Narrowly Tailored For Want Of Limited Duration.

To survive the narrow tailoring prong of strict scrutiny analysis, a statutory racial classification must have at least some limit on duration. More particularly, its duration must not exceed the discriminatory effects it is designed to remedy. 515 U.S. at 237-238. The purpose of this durational limitation is best reflected in Justice Powell's artful phrasing in *Wygant v. Jackson Board of Education*:

> [A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive[; and i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

476 U.S. 267, 276 (1986) (emphasis in original): *See, e.g., Croson*, 488 U.S. at 498 (quoting this passage); *Regents of University of California v. Bakke*, 438 U.S. 265, 307 (1978) ("remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past").

To justify the challenged statutes, however, the panel invoked seven "barriers" to minority participation in commerce that have always been and will always be present for any new entrant to an established industry. Moreover, § 8(d), which sets forth the presumption that

all members of certain races are disadvantaged, has no sunset provision whatsoever. It has been a permanent fixture of federal law since its passage in 1978, over twenty two years ago. Pub. L. No. 95-507. As a result, if the barriers the panel relied on were capable of justifying the statutory scheme, the duration limitation requirement would be vitiated because these barriers have been present agelessly into the past and will be present timelessly into the future. Consequently, given the panel's reliance on ageless and timeless "barriers," this statutory scheme could only have survived proper narrow tailoring analysis if the duration requirement for strict scrutiny is different for Congress than for a State. This Court must grant *certiorari* to ensure Congress is held to the same strict scrutiny test that applies to racial classifications by other governmental actors.

4. But For The Forbidden Excuses Of Administrative Convenience Or Racial Politics, The Panel Could Not Have Deemed The Challenged Statutory Scheme Narrowly Tailored.

It is apparent that it is legislatively possible to assess individual injury of the members of the presumptively disadvantaged races in the statutory scheme in question. There is no dispute, in fact, that the Secretary has already laid out a method of assessing an individual's actual disadvantaged status on a case by case basis. Specifically, the regulations call for inquiry into whether an individual's injuries: (i) "stem from his or her color"; (ii) come from discrimination "he or she has personally suffered"; (iii) come from "treatment which he or she has experienced in American society"; (iv) "[are] chronic, long-standing, and substantial, not fleeting or insignificant"; and (v) "[have] negatively affected his or her entry into, and/or advancement in, the business world." 49 C.F.R. Part 23, Subpart D, Appendix C, "Social Disadvantage."

There are but two apparent reasons that Congress chose not to require – and, in fact, chose instead to prohibit – such individualized inquiry: administrative convenience and "racial politics." This Court has forbidden both.

Croson plainly precludes the excuse of administrative convenience. 488 U.S at 508. *See also, Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion) (finding, "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Racial politics is equally taboo. As Justice Stevens noted in his dissent in *Fullilove*,

> [I]f th[e] history [of racism in America] can justify such a random distribution of benefits on racial lines as that embodied in this statutory scheme . . . , our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate "a piece of the action" for its members.

448 U.S. at 539 (adopted by majority in *Croson*, 488 U.S. at 511).

Consequently, if the narrow tailoring test were the same for Congress as it is for the States, the challenged statutory scheme could not have passed constitutional muster. *Certiorari* is necessary to resolve this conflict in application of strict scrutiny.

B. The Panel Vitiated The Strict Scrutiny Requirement That A Plaintiff Has No Burden Of Proof Until After The Government Produces Strong Evidence That A Statutory Racial Classification Was Supported At The Time Of Its Enactment By A Compelling State Interest In Remedying Particularized Discrimination In Which The Government Somehow Participated.

This Court has made clear that the use of a racial classification by a governmental actor must be supported

by a strong basis in evidence of a compelling governmental interest in remedying particularized discrimination in which that government somehow participated. *Croson*, 488 U.S. at 492, 500; *Philadelphia*, 91 F.3d at 596 ("compelling state interest that can justify race-based preferences [exists] only when [the government] has acted to remedy identified present or past discrimination in which it engaged or was a 'passive participant' "). In fact:

> [T]he only cases found to present the necessary 'compelling interest' . . . are those that expose, as in the case of the Alabama Department of Public Safety in 1987, 'pervasive, systematic, and obstinate discriminatory conduct.' *Adarand*, 515 U.S. at 237. . . .

Drabik, 214 F.3d at 737.

Logically, of course, a "strong basis in evidence" requires more persuasive evidence than a mere "basis in evidence." Therefore, evidence does not qualify as strong unless that evidence is far more than just relevant or even probative.

Although the panel correctly recited that test, App. at 29-30, the panel badly misapplied each of the elements of that test. First, the panel accepted evidence that suggested, at worst, only society-wide disparities, not particularized findings of racial discrimination. The evidence did not suggest, let alone prove, racial discrimination and certainly not racial discrimination particularly applicable to the highway construction industry. Second, the panel deemed that evidence "strong," even though this Court and others would not even find it probative. Third, the panel's consideration of that dubious evidence was improper because that evidence was not before Congress when it passed the challenged statutes. Finally, having incorrectly decided that US-DOT had met its burden of production of "strong" evidence, the panel then incorrectly held that Adarand failed to rebut that "strong" evidence. Had the court properly applied the compelling

interest prong of the strict scrutiny test, Adarand would have had nothing to rebut.

1. The Panel Accepted As "Strong," Evidence Of Racial Disparities That It Did Not And Could Not Attribute To Deliberate Discrimination.

This Court held in *Croson* that "[i]n the extreme case some form of narrowly tailored racial preference might be necessary to break down patterns of *deliberate* exclusion." 488 U.S. at 509 (emphasis added). In this case, the panel considered only evidence of barriers common to all business start-ups, but nevertheless held that evidence qualified as a demonstration of an "extreme case" that justifies a "racial preference."

The only "evidence" that US-DOT produced, and upon which the panel relied, was its "Appendix I," an eleven-page document that merely recites the conclusory statements in favor of federal DBE legislation by sponsoring members of Congress and by supportive members of self-interested associations. App. at 367. The panel deemed this evidence "strong" and from it the panel discerned the series of seven "barriers" recited in Section I above (*see* App. 367). Those barriers were limited, in essence, to two observations: first, the construction industry is dominated by non-minority family firms that minorities find difficult to inherit; and, second, minority enterprises that wish to compete with these family firms find it difficult to do because, having neither experience nor collateral, they find it difficult to obtain bonding and capital and to develop strong, enduring relationships with vendors and customers.

Every one of the barriers the panel identified is a race-neutral set of circumstances that does not demonstrate racially motivated patterns of deliberate exclusion in the highway construction industry. In fact, the most that these circumstances demonstrate is the difficulty

faced by any new entrant into an established field of business. The District Court below, which functioned as the trier of fact in this case, agreed with this analysis, finding that the most notable deficiencies Congress was trying to remedy were:

> [D]eficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with the bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

965 F.Supp. at 1576. Again, with the exception of racist decisions by government functionaries, for which anti-discrimination statutes already provide a means of redress,[5] every one of these deficiencies is a race-neutral set of circumstances common to all business startups.

Therefore, if the panel's analysis goes uncorrected, even such ubiquitous circumstances as these could serve as an "extreme case" that justifies the "last resort" of compulsory racial discrimination. It is absolutely clear that the holding of the panel is in intolerable conflict with the holdings of this Court as to what evidence suffices for the imposition of racial remedies. This Court must grant the petition to resolve this conflict.

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[5] At the very least, "[t]he first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis." *Metro. Dade County*, 122 F.3d at 928-929. As this Court held in *Croson*, the government "could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." 488 U.S. at 509.

2. The Panel Accepted As "Strong," Evidence It Could Not Properly Have Concluded Was Even Probative Without Further Analysis.

This Court has held that "highly conclusionary statement[s] of a proponent of [DBE programs] that there was racial discrimination in the construction industry . . . are of little probative value in establishing identified discrimination. . . . " *Croson*, 488 U.S. at 500. In this case, the government's proffered evidence consistent of little else.

Instead, in order to conclude that there is strong evidence of a compelling interest, a court must find proper statistical evidence that the government participated, at least passively, in deliberate patterns of racial exclusion. *Croson*, 488 U.S. at 492, 500. As the panel below correctly recognized, anecdotal evidence may be considered only after it is determined that the necessary statistical evidence exists. App. at 29, *citing Concrete Works of Colo. v. City and County of Denver*, 36 F.3d 1513, 1520-21 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). That statistical evidence, moreover, must be derived from the proper sample pool, which consists of those contractors who are not only qualified to perform the contracts in question, but also who are not otherwise engaged at the time. As this Court held in *Croson*,

> [C]omparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. . . . [W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

488 U.S. 501-502. This Court has noted that when a reviewing court fails to address whether the statistical evidence was derived from the proper sample, any finding of racial animus would rest on only "the completely unrealistic assumption that minorities will choose to

enter construction in lockstep proportion to their representation in the local population." *Id.* at 741. Accordingly, the Sixth Circuit held that:

> [D]eficiencies of the data are glaringly clear . . . [when] the data does not distinguish minority construction contractors from minority businesses generally, [or] makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.

Drabik, 214 F.3d at 736.

Nevertheless (assuming US-DOT's "Appendix I" somehow placed the necessary statistical evidence before the court, which it did not), the panel utterly failed to determine if those statistics took account of whether the contractors in the studies were "ready, willing and able" to do the work in question. Nowhere in its decision does the panel even address whether the alleged racial disparities it deemed "strong evidence" were derived from the proper statistical pool.

Likewise, the panel did not even inquire whether the government had played some active or passive role in causing any racial disparity that exists. App. at 31-49. For example, the panel asserted that:

> [S]ubcontractors' unions place before minority firms a plethora of barriers to membership, thereby effectively blocking [DBEs] from participation in a subcontracting market in which union membership is an important condition for success.

App. at 35. But then, without further analysis of this allegation or others like it, the panel simply concluded there was strong evidence of a compelling interest. Yet there was no analysis of whether the government somehow participated in the allegedly racially discriminatory practices of "subcontractors' unions."

Even if the panel had attempted to address the government participation issue, it could not have concluded properly that there was any evidence of governmental participation because discrimination must consist of more than simply paying the bills. In fact, under proper strict scrutiny analysis there is no evidence of government participation even when the government hired contractors that did business with third parties who engaged in racially discriminatory practices. *See Croson*, 488 U.S. at 502-03. The Third Circuit expressly denied, for example, that:

> [A]warding contracts pursuant to competitive bidding scheme and without reference to association membership could alone constitute passive discrimination by the [government] in membership discrimination by [those] contractor associations.

Philadelphia, 91 F.3d at 602. In this case, there is no evidence of even this third-party discrimination.

The panel therefore could not properly have concluded that the evidence before it was probative, let alone "strong," without further analysis. As a result, the panel's holding creates an intolerable conflict with the decisions of this and other courts as to what sort of evidence will suffice at the national level to justify statutory racial classifications. *Certiorari* is necessary as a result.

3. The Panel Accepted As "Strong," Evidence That Did Not Exist At The Time Of The Statutes' Enactment And That Therefore The Panel Should Not Have Considered At All.

This Court has made clear that "a racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature." *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996). Instead, "the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification. . . . " *Id.* Furthermore, and crucially, "the institution that makes the racial distinction must have had a strong basis in

evidence to conclude that remedial action was necessary *before* it embarks on an affirmative-action program." 517 U.S. at 910 (emphasis in original, internal punctuation omitted); *accord Bush v. Vera*, 517 U.S. 952, 982 (1996) (the legislature " 'must have had a 'strong basis in evidence' to conclude that remedial action was necessary, 'before it embarks on an affirmative action program,' " *quoting Shaw v. Hunt*, 517 U.S. at 910; *Croson*, 488 U.S. at 504 (requiring that government actors "must identify that discrimination . . . with some specificity *before* they may use race-conscious relief") (emphasis added). As the Sixth Circuit put it, "[T]he time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding." *Drabik*, 214 F.3d at 738.

In this case, however, none of the evidence the panel relied on was before Congress when it passed the racial presumptions in the challenged statutes. Congress enacted section 8(d) on October 24, 1978. Pub. L. No. 95-507. The panel, on the other hand, relied exclusively on statements and purported disparity studies and hearing reports and the like, none of which was dated any earlier than 1985, seven years too late. In fact, the panel relied most heavily on *The Compelling Interest*,[6] a *Federal Register* entry that was not published until 1996, five years after Congress passed ISTEA. Pub. L. 102-240 (December 18, 1991). Like STAA, STURAA, and ISTEA, moreover, TEA-21 is race-neutral on its face and only incorporates racial classifications by reference to § 8(d). Pub. L. No. 105-178, § 1101(b) (1998). Consequently, only evidence before Congress prior to 1978 is of value.[7]

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[6] *The Compelling Interest for Affirmative Action in Federal Procurement*, 61 F.R. 26050 (1996).

[7] There is no evidence that Congress, during adoption and re-enactment of the federal race-based highway construction contracting program in 1982, 1987, 1991, and 1998, ever revisited its 1978 determination in order to ascertain whether all the racial groups set forth therein had been the victims of racial discrimination in the highway construction industry, racial discrimination in which the government somehow participated.

Further, the panel admits that not even *The Compelling Interest* cites anything prior to 1980. App. at 31 (finding *The Compelling Interest* cites "approximately thirty congressional hearings since 1980"). 1980 is two years too late to be of relevance in this case. Therefore, not only did the panel improperly weigh the strength of the evidence before it, it should not have considered that evidence at all.

4. Congress' Only Apparent Goal In Incorporating The Challenged Racial Presumptions Into TEA-21 Was "Racial Proportionality," Which Cannot Serve As A Compelling Interest Regardless Of The Evidence.

As this Court held in *Croson*, racial proportionality cannot serve as a compelling interest, regardless of any evidentiary standard:

> The desire to reduce the historic deficit of traditionally disfavored minorities . . . and the need to counter the effects of societal discrimination . . . standing alone, was not merely insufficiently compelling to justify a racial classification, it was "discrimination for its own sake," forbidden by the Constitution.

488 U.S. at 496. Other courts have followed suit. *E.g. Hopwood v. Texas*, 78 F.3d at 944 ("any consideration of race or ethnicity . . . for the purpose of achieving a diverse student body is not a compelling interest. . . . ").

Nevertheless, it is clear from the legislative history of the most recent highway funding statute to incorporate the racial classifications of § 8(d), TEA-21, that Congress

was not even attempting to provide a vehicle for remedying individualized harm. Its only goal was racial proportionality in the highway construction industry.[8] In fact, the record bears no indication at all of any permissible legislative intent. Consequently, *certiorari* is necessary because, if racial proportionality may serve as a compelling interest on the congressional level, then strict scrutiny applies differently to Congress, contrary to this Court's holding in this very case.

In addition, *certiorari* is necessary because, contrary to this Court's rulings in *1995 Adarand* and *Croson*, lower courts have adopted widely varying standards for the same strict scrutiny test. *See Tuttle v. Arlington City School Bd.*, 195 F.3d 698, 704 (4th Cir. 1999), *cert. denied*, 120 S.Ct. 1552 (2000) ("The first question is whether diversity is a compelling governmental interest[; t]his question remains unresolved."); *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344, 354 (D.C. Cir. 1998) (court "did not think diversity can be elevated to the 'compelling' level"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998), *cert. denied*, 525 U.S. 981 (1998) (whether there may be compelling interests other than remedying past discrimination remains "unsettled"); *Wessmann v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998) (assuming, without deciding, that diversity may be a compelling governmental interest).

5. By Improperly Deeming The Submitted Evidence "Strong," The Panel Misapplied The Burdens Of Proof And Production.

Properly applied, the burden of producing strong evidence is the "burden of justification," and, even in an

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[8] *See generally* 144 Cong. Rec. S1395-S1434 (March 5, 1998); 144 Cong. Rec. S1481-S1496 (March 6, 1998); 144 Cong. Rec. H2000-H2011 (April 1, 1998).

intermediate scrutiny case, the evidence must be "exceedingly persuasive." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (post-*1995 Adarand* decision striking gender-conscious legislation, Ginsburg, J., delivering 7-1 opinion of court) (emphasis added). The burden of producing it "rests *entirely* on the state." *Id.* (emphasis added). In this case, however, after reciting and accepting evidence that was not proper evidence at all, much less strong evidence of a compelling interest, the panel shifted the burden to Adarand to disprove that evidence and found that Adarand had failed to do so. App. at 50-54. Under proper strict scrutiny analysis, Adarand would have had nothing to rebut because the government had not produced the necessary evidence.

By its decision, the panel turned a blind eye to Congress' professed but constitutionally inadequate justification, even though this Court has ruled that: "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 500-501. This blind deference cannot be allowed to alter the dictates of this Court in this very case: strict scrutiny applies equally, in substance and in process, to Congress and all other governmental actors. *Certiorari* is therefore necessary to correct this conflict.

C. By Allowing A Putative New Regulatory Regime To Rescue The Compulsory Statutory Racial Presumptions From Constitutional Infirmity, The Panel Ignored That The Regulations Are Inapposite, Insufficient, Or Void.

After holding the federal race-based program to be facially constitutional, the panel held that the SCC applied those statutes unconstitutionally and enjoined its further use. App. at 59. Thereupon, the panel went on to analyze whether "the new federal regulations under TEA-21" survive "strict scrutiny." Those new regulations,

concluded the panel, solve the narrow tailoring problems of failing to attempt race-neutral alternatives and of over-inclusiveness, by requiring race-neutral alternatives, App. at 59, and by negating the presumption of economic disadvantage for DBE applicants whose net worth exceeds a specified amount. App. at 74-75. Remarkably, the panel fails to recognize that the "new federal regulations" do not apply to this case and, in any event, apply only to economic disadvantage. Further, if the regulations did apply, by nullifying the express statutory directive to presume economic disadvantage, they would themselves become unconstitutional.

1. The New Regulations Regarding Race-Neutral Alternatives Are Completely Inapposite Because They Apply To State Entities, Not To US-DOT, And To Grants, Not To Direct Procurement.

The regulations that the panel relied on in finding the statutes constitutional as applied are, in reality, completely inapposite. This case involves direct procurement of goods and services by US-DOT. As this Court noted the first time it considered this case, "the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation ([US-]DOT), awarded the prime contract for a highway construction project" to the contractor that hired Gonzales instead of Adarand. 515 U.S. 200, 204. To save the statutes from lack of narrow tailoring for failure to attempt race-neutral alternatives, however, the panel relied on the newly revised 49 C.F.R. part 26. Specifically, it quoted § 26.51 for the new rule that prime contractors "must meet the maximum feasible portion of [their] overall [racial participation] goal by using race-neutral means of facilitating DBE participation." App. at 59. The new set of regulations, however, "affects *only* the airport, transit and highway financial assistance programs of the Department[; it only]

concerns the *state and local*, rather than the federal, procurement actions." 62 F.R. 29548 (May 30, 1997) (emphasis added). In fact, in a section entitled "To whom does this part apply?," the regulations themselves plainly state, "[I]f you are letting a contract in which [US-]DOT financial assistance does not participate, this part does not apply to the contract." 49 C.F.R. § 26.3(d) (2000). This case deals exclusively with direct federal procurement and has nothing to do with financial assistance; therefore, 49 C.F.R. part 26 is irrelevant.

2. The New Regulations Regarding Presumptions Are Insufficient To Save The Statutes Because The Regulations Do Not Even Purport To Alter The Presumption Of Social Disadvantage, Leaving The Statute Unconstitutionally Over-Inclusive On Its Face.

The twin presumptions of social and economic disadvantage together render the statutory scheme over-inclusive, but the panel held that the purported alteration – of only the economic presumption – saves the statute from constitutional infirmity. The new regulations, the panel held:

> [E]liminated the discrepancy between the individualized determination of economic disadvantage characterizing the § 8(a) program and the non-individualized presumption of economic disadvantage characterizing the § 8(d) program. *See* 48 C.F.R. § 19.001 (2000) (providing that the § 8(d) program regulations expressly incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A); *see also* 48 C.F.R. § 19.703 (2000) (eliminating the race-based presumption of economic disadvantage of the former regulation); *id.* § 52.219-8.

App. at 74-75. Since the presumption of social disadvantage remains intact even if these regulations applied in this case, it is apparent from the panel's analysis that the statutes remain every bit as over-inclusive as ever.

3. If The New Regulations Did Apply, They Would Be Void.

It is settled law that "[r]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larinoff*, 431 U.S. 864, 873 (1977). Therefore, since the "new regulations" the panel relies on would contravene § 8(d), they are void.

The new regulations regarding the 8(d) economic presumption, as the panel observed, "impose a new requirement on applicants with regard to an individualized showing." App. at 75. Each applicant "must submit a narrative statement describing the circumstances of that purported economic disadvantage." *Id., citing* 13 C.F.R. § 124.104(b)(1) (2000) and 49 C.F.R. §§ 26.65(b), 26.67(b)(1) (2000). The panel explains that the new regulations rescue the statute by incorporating an "automatic rebuttal" of the presumption of disadvantage, "without a requirement of further proceedings," if the applicant's "net worth is above $750,000." App. at 94.

Under § 8(d), however, and thus under TEA-21, which incorporates the presumptions of § 8(d), the presumptions of both social and economic disadvantage are mandatory: 15 U.S.C. § 637(d)(3)(C). "The contractor *shall presume* that socially *and* economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . . " *Id.* (emphasis added).

The presumption, as demonstrated by over twenty years of US-DOT practice, means that US-DOT is not permitted to require evidence from minority applicants

for DBE status unless and until some third party challenges that status. The new regulations require such evidence, even in the absence of a challenge. That evidence, however, may not be used to deny DBE status to a statutorily eligible minority individual; that eligibility is mandated by the federal statute that presumes that all members of certain races are "socially and economically disadvantaged." Moreover, this Court held in this very case that any such race-neutral regulations are "patent[ly] incompatib[le]" with § 8(d). *2000 Adarand*, 102 S.Ct. at 726. The "new regulations" therefore contravene § 8(d), would be void if they applied, and cannot rescue this program.

II. THIS CASE, NOW PENDING FOR OVER A DECADE, INVOLVES A MATTER OF EXCEPTIONAL NATIONAL IMPORTANCE THAT DEMANDS A FINAL DECISION ON THE MERITS BY THIS COURT SO THAT NUMEROUS SIMILAR CASES NOW PENDING THROUGHOUT THE FEDERAL COURT SYSTEM MAY BE DECIDED PROPERLY AND CONSISTENTLY.

The statutes at issue in this case compel race discrimination by US-DOT and by those engaged in federal highway construction. In considering racially motivated governance, this Court has long been united in its belief that race-based legislation is to be viewed as a "last resort" appropriate only in an "extreme case" because racism is so offensive to basic concepts of liberty. *Croson*, 488 U.S. at 509; *Philadelphia*, 893 F.Supp. at 424. Further, as Justice Brennan wrote, "[P]referential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection." *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74 (1977). Justice Stevens expressed the same concern: "[A] statute of this kind

inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race [and] can only exacerbate rather than reduce racial prejudice." 448 U.S. at 545 (dissenting). Since this case involves racial preferences on the federal level, it cries out for resolution by this Court.

Further, Adarand filed the complaint in this case over ten years ago, on August 10, 1990. Since then Adarand has twice brought this case before this Court, even though there are no unresolved issues of fact. Both times, this Court deemed it prudent to allow the lower courts to resolve certain questions regarding the interplay of the statutes and regulations. *1995 Adardand*, 515 U.S. at 238. Those issues having been resolved below, Adarand now petitions this Court once again for a decision on the merits. There are no further issues of fact, and this Court is best equipped to answer any outstanding questions of law.

In addition, numerous cases now pending in the federal courts would benefit from a decision on the merits in this case. For example, to name a few, *Dynalantic Corp. v. U.S. Dept. of Defense*, 937 F.Supp. 1 (D.D.C. 1996); *Rothe Development Corp. v. U.S. Dept. of Defense*, 49 F.Supp.2d 937 (W.D.Tex. 1999); *McCrossan Construction, Inc. v. Rahn*, 96 F.Supp.2d 1238 (D.N.M. 2000). This Court should therefore grant Adarand's petition.

CONCLUSION

For all of the above reasons, Adarand respectfully requests that this Court grant this petition.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff-Appellee,

v.

RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administratin; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants-Appellants,

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

No. 97-1304

OPINION ON REMAND

(Filed Sep. 25, 2000)

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-K-1413)

Leslie A. Simon, Attorney, United States Department of Justice, (Nancy E. McFadden, General Counsel, Paul M. Geier, Assistant General Counsel for Litigation, Edward V.A. Kussy, Acting Chief Counsel, Federal Highway Administration, Sara McAndrew, Trial Attorney, Peter S. Smith, Trial Attorney, of the United States Department of Transportation, Washington, D.C.; Isabelle Katz Pinzler, Acting Assistant Attorney General, William R. Yeomans, Acting Deputy Assistant Attorney General, Bill Lann Lee, Acting Deputy Assistant Attorney General, Thomas E. Perez, Deputy Assistant Attorney General, Mark L. Gross, Attorney, Louis E. Peraertz, Attorney, of the United States Department of Justice, Washington, D.C., with her on the briefs), for Defendants-Appellants.

William Perry Pendley (Todd S. Welch and J. Scott Detamore, with him on the briefs), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff-Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., for Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

Julian A. Gross and William C. NcNeill III, Legal Aid Society of San Francisco, for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie Anita Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before **LUCERO**, Circuit Judge, **McKAY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

LUCERO, Circuit Judge.

Following the Supreme Court's vacation of our dismissal on mootness grounds, we address the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, we must resolve the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). Our evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("*Adarand III*").

In his concurring opinion in *Adarand III*, Justice Scalia succinctly articulated this Nation's guiding aspiration: "In the eyes of government, we are just one race here. It is American." *Id.* at 239 (Scalia, J., concurring in part and concurring in the judgment). Until that future day when

national aspiration and national reality converge, the Court has made clear that under certain circumstances the federal government may use race-conscious means to remedy the effects of historical and present-day racial discrimination. Inherently, we resolve whether the two branches of the government – the Legislative and the Executive – that have chosen to hasten that future day have met the constitutional standards enunciated by the third branch. Since the district court last considered this case, and after lengthy congressional hearings in response to the *Adarand III* decision, the federal government has significantly changed the way in which it implements the challenged race-conscious programs in highway construction contracting. It is ultimately our considered judgment that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, pass constitutional muster: They are narrowly tailored to serve a compelling governmental interest. Thus, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we reverse the judgment of the district court below.

I

The Supreme Court has characterized the facts of this case as "fairly straightforward," *Adarand III*, 515 U.S. at 206, summarizing the relevant facts as follows:

> In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

Id. at 205. At the time, Gonzales was certified as a small business owned and controlled by socially and economically disadvantaged individuals, while Adarand was not. *See id.* This litigation centers around the SCC, a clause which was included in CFLHD's prime contract with Mountain Gravel. The SCC provided "that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.' " *Id.* (citation omitted).

Adarand submitted an affidavit stating that but for the additional compensation Mountain Gravel obtained by hiring Gonzales, a certified business, it would have hired Adarand for the guardrail work. *See id.* Adarand sued, arguing that the use of a race-conscious presumption in determining who is a socially and economically disadvantaged individual for purposes of the SCC violated its Fifth Amendment equal protection rights. *See id.* at 205-06.

In *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992) (*"Adarand I"*), the district court addressed Adarand's challenge to "the DBE program as administered by the CFLHD within Colorado." *Id.* at 241 (footnote omitted). Without focusing specifically on the SCC and its operation, the court in *Adarand I* upheld as

constitutional, under intermediate scrutiny, statutory provisions defining DBEs and setting goals for DBE participation in government contracting. *See id.* at 241, 244-45 (relying on *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 598-601 (1990)).

In *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1539 (10th Cir. 1994) (*"Adarand II"*), this Court affirmed the district court's judgment on different grounds. We concluded that Adarand had standing to challenge the SCC program as it pertains to minority business enterprises but not women-owned business enterprises and addressed our inquiry to the SCC as a program implemented pursuant to § 502 of the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384 (codified as amended, 15 U.S.C. § 631 *et seq.*). *See Adarand II*, 16 F.3d at 1543 (citing 15 U.S.C. § 644(g)). Like the district court, we relied on *Metro Broadcasting*, 497 U.S. at 565, applying intermediate scrutiny to the SCC and holding "the SCC program . . . constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small [DBEs], as required under section 502 of the [SBA]." *Adarand II*, 16 F.3d at 1547.

The Supreme Court reversed. It overruled *Metro Broadcasting* and cast doubt on *Fullilove* insofar as that case might be read to apply less than strict scrutiny to

federal programs involving racial classifications. *See Adarand III*, 515 U.S. at 227, 235.[1]

On remand, the district court held the SCC program unconstitutional, finding it insufficiently narrowly tailored to further a compelling interest because the program was both over- and under-inclusive, including minority individuals who were not in fact disadvantaged and excluding non-minority individuals who were disadvantaged. *See Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556 (D. Colo. 1997) (*"Adarand IV"*). With regard to the Court's pronouncement in *Adarand III* that strict scrutiny is not "fatal in fact," the district court found it "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact. *Id.* at 1580. The district court granted summary judgment to Adarand.

Following *Adarand IV*, we considered the government's contention that subsequent events had rendered the case moot. *See Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999) (*"Adarand V"*). Specifically, because Adarand applied for and was granted DBE certification by the Colorado Department of Transportation

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[1] The principal focus of *Adarand III* was not an analysis of the particular statutes and regulations before the Court under its newly-announced standard, but the far more abstract question of whether "benign" race-conscious programs are subject to the "strict scrutiny" doctrine, a question which the majority answered in the affirmative. *See Adarand III*, 515 U.S. at 225-27. In its enunciation of the strict scrutiny standard and its overruling of *Metro Broadcasting*, the Court accorded very little attention to the application of the strict scrutiny test to the particular programs at issue in this case.

("CDOT"), we concluded that Adarand could no longer demonstrate an injury stemming from the SCC sufficient to confer standing. *See id.* at 1296-97. Hence, the case was moot. *See id.*

The Supreme Court disagreed. *See Adarand Constructors, Inc. v. Slater*, 120 S. Ct. 722 (2000) (*"Adarand VI"*). Relying on its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S. Ct. 693 (2000), handed down on the same day as its *Adarand VI* remand, the Court stated it had "recently noted" that a possibility of a defendant "engag[ing] in (or resum[ing]) harmful conduct" might be too speculative to confer standing but not too speculative to overcome mootness. *Adarand VI*, 120 S. Ct. at 726 (quoting *Friends of the Earth*, 120 S. Ct. at 699). The Court held it was "far from clear" that DOT would not initiate proceedings to revoke Adarand's status and because "it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,' petitioner's cause of action remains alive." *Id.* at 726-27 (quoting *Friends of the Earth, Inc.*, 120 S. Ct. at 708). With the reversal of our judgment in *Adarand V*, this appeal was remanded to us for consideration on the merits. *See id.* at 726-27.

In the discussion that follows, we first dispose of three threshold concerns: (1) a determination of the appropriate versions of the statutes and regulations at issue in this case; (2) the scope of our review of the SCC program; and (3) a brief overview of the relevant statutory framework and of the SCC program. Then, in Part III we subject the SCC program to strict scrutiny, examining

the compelling interest underlying the program as well as its narrow tailoring, and addressing specific issues that the Supreme Court in *Adarand III* directed that we consider. Finally, in Part IV, we briefly discuss the government's request that we consolidate with the instant action a pending, potentially related case, originally filed under the name *Adarand Constructors, Inc. v. Romer*, No. CIV. A. 97-K-1351 (D. Colo. June 26, 1997).

II

We begin by addressing the scope of our inquiry in this appeal. It is essential that we decide which versions of the statutes and regulations at issue are properly before us, as well as which portions of those statutes and regulations are relevant to this appeal.

Several statutes are implicated in this case, notably §§ 8(a), 8(d) and 502 of the SBA (codified as amended at 15 U.S.C. §§ 637(a), (d), and 644(g)), § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, 145 (1987), § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, 1919-21 (1991), § 1101(b) of the Transportation Equity Act for the 21st Century of 1998 ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107, 113-15 (1998), as well as their accompanying administrative regulations.

A. The Versions To Be Considered

With regard to the foregoing statutes, regulations, and SCC, the parties disagree as to whether we may properly consider intervening changes in the law between 1992 when *Adarand I* was handed down and the present.[2] Our resolution of that dispute is ultimately compelled by the logic of the well-settled precedent of both the Supreme Court and this Circuit. Adarand seeks only prospective declaratory and injunctive relief. *See Adarand III*, 515 U.S. at 210.[3] Application of the intervening statutory and regulatory changes to this type of claim does not implicate any presumption against the retroactive application of statutes. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) ("Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute . . . affects the propriety of prospective relief, application of the new provision is not retroactive."); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1149 (10th Cir. 1999) (applying *Landgraf*), *cert. denied sub nom. Palaganas-Suarez v. Greene*, 120 S. Ct. 1539 (2000); *see*

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[2] We have therefore requested and received supplementary briefing from the parties on intervening changes in the statutory and regulatory scheme at issue in the instant action.

[3] Although Adarand also seeks "such other and further relief as to the Court seems just and equitable," this highly general language does not constitute a prayer for retrospective relief under the circumstances of this case. (Appellants' App. at 10.) Moreover, on appeal Adarand seeks to uphold the district court's grant of summary judgment and declaratory and injunctive relief and has not filed a cross-appeal seeking damages or another form of retrospective relief.

also Jones v. Hess, 681 F.2d 688, 695 n.9 (10th Cir. 1982) ("Generally an appellate court must apply the law in effect at the time it renders its decision where a change in law occurs while a case is on direct appeal, although there may well be an exception to this rule to prevent manifest injustice." (citations omitted)); *McMahan v. Hunter*, 179 F.2d 661, 663 (10th Cir. 1950) ("[W]here a rule of law was changed after the decision in the trial court but before the decision in the Appellate Court, the decision in the Appellate Court must be according to the new law."); 13A Charles Alan Wright et al., *Federal Practice & Procedure, Jurisdiction* 2d § 3533.6 (1984) ("Ordinarily, courts . . . apply[ ] the law in force at the time of decision, unless a good reason appears for ignoring the change."); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990). To ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief. The changes in the law are squarely before us today, and we discern no reason to leave their scrutiny to future litigation, in effect prolonging the instant litigation and fostering "both a wasteful expenditure of resources by courts and litigating parties and the gradual undermining of public confidence in the judiciary – in short, Dickens's *Jarndyce v. Jarndyce* syndrome." *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000).

However, considering that we are reviewing a decision of the district court below that relied on older versions of the statutes, regulations, and SCC, and because we are mindful that future statutory and regulatory

changes may cause the government to "engage in (or resume) [the] harmful conduct" in question earlier in this litigation so as to militate against a finding of mootness, *Adarand VI*, 120 S. Ct. at 726 (quoting *Friends of the Earth*, 120 S. Ct. at 699), we consider the statutory and regulatory framework in its prior stages as well.[4] *See also Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982))). It is not

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[4] Thus, we refuse the government's invitation to ignore the SCC program by virtue of its citation to a March 29, 2000 memorandum from the Manager of the Federal Lands Program indicating that the SCC is no longer in use in federal highway construction procurement contracts. We likewise reject the government's argument, relying on *Lawrence v. Chater*, 516 U.S. 163, 165-66 (1996), that we must remand this case to the district court for consideration of intervening statutory and regulatory changes. The government's reliance on *Lawrence* is misplaced: That case involved the Supreme Court's exercise of its power to "grant certiorari, vacate the judgment below, and remand the case" to a *"lower federal court"* in light of intervening regulatory changes, and not the power of a lower federal court to decide a case on remand from the Supreme Court. *Id.* (emphasis added). In the present case, the parties have briefed intervening changes in the law, there are no disputed factual issues, and we see no reason to delay this already protracted litigation by remanding to the district court, especially considering the district court's statement that it would be "difficult to envisage a race-based classification" that would ever be narrowly tailored, thereby effectively pronouncing strict scrutiny fatal in fact, *Adarand IV* 965 F. Supp. at 1580, a view which we reject in the discussion that follows.

fanciful to suggest that the government may retreat to prior practice, but if the government did so, this opinion expressly holds that such an action would be unconstitutional for the reasons discussed below.

B. The Scope of the SCC Program Under Scrutiny

We next clarify the scope of the SCC program under review. In that regard, we are bound by the Supreme Court's ruling on Adarand's standing in *Adarand III* as law of the case. Based on its conclusion that "CFLHD is likely to let contracts involving guardrail work that contain a[n][SCC] at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses," the Court held Adarand has standing to challenge "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause." *Adarand III*, 515 U.S. at 212-13 (citation omitted).

We recognize, however, that there are programs that the Supreme Court did *not* hold Adarand has standing to challenge. First is the § 8(a) program, discussed below. *See* 15 U.S.C. § 637(a). Subsection 8(a) does not involve the use of SCCs, nor has Adarand made any showing that it has been injured by non-inclusion in the § 8(a) program. Second, we specifically held in *Adarand II* that Adarand has not shown standing to challenge "the provisions of the SCC program pertaining to women-owned business enterprises (WBE)." 16 F.3d at 1543. This conclusion was left undisturbed by the Supreme Court, *see Adarand III*, 515 U.S. at 210-12, and remains law of the

case, and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine, *see Agostini v. Felton*, 521 U.S. 203, 236 (1997); *McIlravy*, 204 F.3d at 1034-35. Furthermore, our decision in *Adarand II*, as well as the Supreme Court's remand in *Adarand III*, was limited to the question of the constitutionality of the use of a race-conscious presumption in the SCC program. *See Adarand III*, 515 U.S. at 237-38. This case does not involve, nor has Adarand ever demonstrated standing to bring, a generalized challenge to the policy of maximizing contracting opportunities for small disadvantaged businesses set forth in 15 U.S.C. §§ 637 and 644(g), or to the various goals for fostering the participation of small minority-owned businesses promulgated pursuant to 15 U.S.C. § 644(g), also discussed below. Nor are we presented with any indication that Adarand has standing to challenge paragraphs (4)-(6) of 15 U.S.C. § 637(d). Finally, we agree with the government that throughout the course of this litigation, Adarand's challenge has been to the use of the SCC in direct federal highway procurement contracts entered into by the CFLHD with funds appropriated under STURAA, ISTEA, and TEA-21. In the discussion that follows, we therefore address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. To the extent the district court's judgment can be construed as having reached statutes, programs, and issues beyond the scope of Adarand's standing and the Supreme Court's remand in *Adarand III*, we reverse that judgment.

C. Overview of the Statutory Framework and the SCC

We are now in a position to offer a brief overview of the statutory framework and the SCC underlying this litigation.

> The [SBA] . . . declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." § 8(d)(1), 15 U.S.C. § 637(d)(1). The [SBA] defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," § 8(a)(5), 15 U.S.C. § 637(a)(5), and it defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." § 8(a)(6)(A), 15 U.S.C. § 637(a)(6)(A).
>
> In furtherance of the policy stated in § 8(d)(1), the Act establishes "[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals" at "not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." 15 U.S.C. § 644(g)(1). It also requires the head of each federal agency to set agency-

> specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Id.*

Adarand III, 515 U.S. at 206. These goals must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. *See* 15 U.S.C. § 644(g)(2), (h)(1). Under both § 8(a) and § 8(d), subcontractors can be certified as DBEs, qualifying them for the SCC program at issue in this litigation.

STURAA, ISTEA, and TEA-21, the transportation appropriations statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d). *See* STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B); TEA-21 § 1101(b)(2)(B) (providing that the term "socially and economically disadvantaged individuals" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto."). STURAA, ISTEA, and TEA-21 all set forth aspirational goals of 10% DBE participation in federal subcontracting. *See* STURAA § 106(c)(1); ISTEA § 1003(b)(1); TEA-21 § 1101(b)(1).[5]

The SCC is a means of implementing the various statutory goals and directives at issue in this litigation. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor for employing a DBE. (*See* Appellants' App. at 55-56.) Subcontractors must be

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[5] The relevant statutes have remained unchanged in all respects material to this litigation from 1992 to the present, except as noted in the Appendix to this opinion.

certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." *Adarand III*, 515 U.S. at 209-10. In November of 1997, the SCC at issue in *Adarand IV* was revised, leaving the basic framework in place. At present, the government maintains, and Adarand does not dispute, that SCCs are no longer in use. (*See* Appellants' Supp. Br. Attach. 1.)

A discussion of the complex, cumbersome, and changing regulations promulgated pursuant to the foregoing statutes, as well as a more thorough summary both of the statutory framework itself and of the SCC, is incorporated as an Appendix to this opinion. Otherwise, changes in the relevant portions of the regulations and SCC are discussed in our application of the strict scrutiny standard that follows.

III

In reviewing the district court's grant of summary judgment to Adarand, we employ our customary standard of review:

> We review a grant of a motion for summary judgment de novo, applying the same legal standard used by the district court. *See Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

> Fed. R. Civ. P. 56(c). We view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmoving party. *See Byers*, 150 F.3d at 1274.

McGarry v. Board of County Comm'rs, 175 F.3d 1193, 1198 (10th Cir. 1999). At the very outset, before immersing ourselves in the intricacies of the issues before us, we emphasize our substantial agreement with much of the district court's judgment as it pertains to the versions of the statutes and regulations in place in 1996. Insofar as the court's judgment does not exceed the proper scope of its review and with the significant caveat that we disagree both with the court's conclusion regarding the fatality in fact of strict scrutiny and with its ultimate result in light of the current version of the relevant regulations, we take the district court's view of the matter. And we share wholeheartedly its sentiment that the time has come for this litigation to come to an end. *See Adarand IV*, 965 F. Supp. at 1558.

A. Evolution of Strict Scrutiny Standards

The Supreme Court's declarations in the affirmative action area are characterized by plurality and split opinions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review. We therefore begin our analysis with a brief review of what we understand to be the current state of the law in this area.

Twenty years ago, the Supreme Court addressed a direct precursor of the statutes at issue today in *Fullilove*,

448 U.S. at 448. Although *Fullilove* failed to produce a majority opinion, six Justices voted to affirm the program at issue – the "minority business enterprise" ("MBE") provision of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, § 103(f)(2). *See Fullilove*, 448 U.S. at 453. The MBE provision required that, subject to waiver by the Secretary of Commerce, "no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." *Id.* at 454 (quoting 42 U.S.C. § 6705(f)(2) (1976 ed., Supp. II)). For purposes of the MBE set-aside, MBEs were defined as businesses owned and controlled by individuals who could be classified as "Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts." *Id.* (quoting 42 U.S.C. § 6705(f)(2)). The MBE program was a mandatory set-aside; under the relevant regulations, a request for waiver could be granted, among other circumstances, if a minority business enterprise quoted an "unreasonable" price. *Id.* at 470-71 (internal quotation and citation omitted).

Chief Justice Burger, joined by Justices White and Powell, applied what appears to be a more deferential standard than what the Court often terms "strict scrutiny":

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to " 'provide for the . . . general

> Welfare of the United States' and 'to enforce, by appropriate legislation,' " the equal protection guarantees of the Fourteenth Amendment.

Id. at 472 (quoting U.S. Const., art. I, § 8, cl. 1); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 487 (1989) (Op. of O'Connor, J.) ("The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review.").

Adarand III, 515 U.S. at 235, cast doubt on *Fullilove*. "[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it." *Id.* We interpret that statement in *Adarand III* as precluding reliance on *Fullilove* for either the standard of review or the result in this case. Otherwise, the programs at issue here would almost certainly pass muster under the *Fullilove* standard because, in furtherance of substantially similar goals, the programs before us impose a significantly more flexible and less intrusive remedy – a voluntary subsidy as opposed to a fixed set-aside subject to waiver.[6]

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[6] We note that the *Adarand III* Court's qualified repudiation of *Fullilove* would appear to leave in place other aspects of that case, most notably its factual determinations regarding congressional findings and the legislative history of the SBA discussed in the Chief Justice's opinion and further elaborated upon in the concurring opinion of Justice Powell. *See Croson*, 488 U.S. at 488 (Op. of O'Connor, J.) ("In reviewing the legislative history behind the Act, the principal opinion focused on the

In 1989 the Court produced a majority for a portion of an affirmative action opinion. *See Croson*, 488 U.S. at 469. In *Croson*, the Court struck down under strict scrutiny a municipal plan requiring "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more [MBEs]." *Id.* at 477. In so doing, Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, rejected the competing arguments that a state's power to remedy racial discrimination is equal to that of Congress under § 5 of the Fourteenth Amendment and that the Fourteenth Amendment effectively preempts state action in matters of race. *See id.* at 489-93 (Op. of O'Connor, J.).[7] A plurality of the Court then proceeded to reject the proposition that the level of scrutiny varies in cases of "benign" and invidious racial classifications, noting that black Americans constituted a controlling political majority in the city of Richmond, a fact militating

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evidence before Congress that a nationwide history of past discrimination had reduced minority participation in federal construction grants.") (citing *Fullilove*, 448 U.S. at 458-67 (Op. of Burger, C.J.)); *id.* at 489 (citing the concurring opinion of Powell, J., in *Fullilove*). Thus, where Fullilove's factual findings bear on the factual underpinnings of this case, we so note in the discussion that follows. The separate question of whether those findings are adequately supported by evidence, pursuant to *Adarand III*'s application of *Croson* to federal race-conscious programs, is one we consider at length in Subsection B below.

[7] Despite overruling *Metro Broadcasting* and casting doubt on *Fullilove*, the majority opinion in *Adarand III* firmly rejected the suggestion "that any Member of this Court has repudiated in this case his or her previously expressed views on the subject" of Congress's powers under § 5 of the Fourteenth Amendment. *Adarand III*, 515 U.S. at 231.

against the application of a more deferential standard of review. *Id.* at 495-96 (Op. of O'Connor, J.).

What did produce a clear majority in *Croson* was the proposition that "the factual predicate offered in support of the Richmond Plan suffers from the two defects identified as fatal in *Wygant [v. Jackson Board of Education*, 476 U.S. 267 (1986)]," *Croson*, 488 U.S. at 498, namely, failure to make findings specific to the market to be addressed by the remedy and to provide limits to the scope of that remedy due to only generalized findings of discrimination.[8] The Court stated that "[w]hile there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia." *Id.* at 499. In particular, the majority noted it was "sheer

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[8] *Croson* cannot be read, as Adarand would have it, as standing for the proposition that findings of "the present effects of past discrimination in the construction industry," 488 U.S. at 498 (citation omitted), are automatically insufficient to justify remedial action. This characterization of *Croson* overlooks a very significant difference between the Richmond Plan at issue in *Croson* and the congressional enactments at issue in the instant case. The City of Richmond had no authority to remedy the present effects of past discrimination in the entire construction industry nationally, and the City was not permitted to simply infer that congressional findings as to the entire industry applied equally to the particular market within its jurisdiction. *See id.* at 504-05. The remediation of nation-wide problems, however, is particularly within the purview of Congress, and findings of industry-wide discrimination are precisely what is relevant to a federal decision to undertake remedial action. *See id.* at 490, 504.

speculation" to simply guess how many firms there would be absent past discrimination and "[t]he 30% quota cannot in any realistic sense be tied to any injury suffered by anyone." *Id.*

After noting the City of Richmond's failure to link its remedial program to specifically identified past discrimination, the *Croson* majority made two additional observations explaining why the City's program was not narrowly tailored. *See id.* at 507. First, the Court noted "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." *Id.* (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)). The Court suggested that race-neutral programs of municipal financing for small firms might increase minority participation without the use of a direct racial preference. *See id.*

Second, the Court declared "[t]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)).

Adarand III, 515 U.S. at 235 (citing *Fullilove*, 448 U.S. at 496 (Powell, J., concurring)), followed and held that "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." Now, informed by the Supreme Court's directives pertaining to remand, and its multifaceted jurisprudence on affirmative action

programs, we turn to the task of assessing the application of racial presumptions in the SCC program under a strict scrutiny standard.

B. Compelling Interest

We "decide the question [of] whether the interests served by the use of [SCCs] are properly described as 'compelling.' " *Adarand III*, 515 U.S. at 237. In so doing, our inquiry necessarily consists of four parts: First, we must determine whether the government's articulated goal in enacting the race-based measures at issue in this case is appropriately considered a "compelling interest" under the governing case law; if so, we must then set forth the standards under which to evaluate the government's evidence of compelling interest; third, we must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, we must examine wether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper. We begin, as we must, with an inquiry into the meaning of "compelling interest."

1. "Compelling Interest" in Race-Conscious Measures Defined

We know from *Adarand III* that, as a general proposition, there may be a compelling interest that supports the enactment of race-conscious measures. Justice O'Connor explicitly states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination

against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (stating that "remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions" (citing *Croson*, 488 U.S. at 498-506)). Interpreting *Croson*, we have recognized that "the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion practiced by elements of the local construction industry' by allowing tax dollars 'to finance the evil of private prejudice.' " *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) (quoting *Croson*, 488 U.S. at 492).

The government identifies the compelling interest at stake in the use of racial presumptions in the SCC program as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups." (Appellants' Br. at 21.) The district court in *Adarand IV*, 965 F. Supp. at 1572, held this interest is properly described as compelling, reasoning that "it appears that Justice O'Connor's assertion in *Croson*, that Congress has the ability under Section 5 [of the Fourteenth Amendment] to recognize and address racial discrimination, has been left undisturbed." Although we decline to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress, acting through the Executive branch, to address racial discrimination by

the states, we readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *See Croson*, 488 U.S. at 492 (Op. of O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." (citing *Norwood v. Harrison*, 413 U.S. 455, 465 (1973))); *Norwood*, 413 U.S. at 463 ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

In its brief, Adarand cites general language from *Adarand III* in an attempt to limit the permissible scope of Congress's power to redress the effects of racial discrimination, ignoring the substantial differences between the scope of problems to be addressed by Congress and those to be addressed by a city council such as that in *Croson*. The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government. *See Croson*, 488 U.S. at 489 (Op. of O'Connor, J.).[9] Although there is not a clear

[9] *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993), cited by appellee, is distinguishable both in that it involved a city-based rather than a nationwide program, and in that the program at issue was based on far scantier evidence than that available in the instant case.

majority on the Court for the proposition that § 5 of the Fourteenth Amendment grants Congress broad remedial powers in the area of discrimination, in Section II of Justice O'Connor's opinion in *Croson*, Justice O'Connor and Chief Justice Rehnquist endorsed that proposition. *See Croson*, 488 U.S. at 490 ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate."). The geographic scope of Congress's reach in this regard is "society-wide" and therefore nationwide. *See id.*[10]

[10] The parties and their respective amici curiae differ sharply as to the relevant geographical scope to be considered in assessing the government's basis in evidence for concluding that race-conscious remedial action is necessary. Adarand and its amici argue based on *Croson* for the necessity of findings regarding both discrimination and the availability of qualified DBEs in a particular local market as a necessary prerequisite to any government action. We disagree, concluding that the absence of such findings is more properly addressed in this case under the rubric of narrow tailoring. Quite apart from the question of Congress's power under § 5 of the Fourteenth Amendment left unresolved by the *Adarand III* majority, *see Adarand III*, 515 U.S. at 230-31, the compelling interests to be addressed by Congress, whether under the Commerce Clause, Spending Clause, or Fourteenth Amendment, are necessarily different in geographic scope than those properly addressed by a city. *See, e.g., Croson*, 488 U.S. at 505 (focusing on lack of "identified discrimination in the Richmond construction industry"); *Concrete Works*, 36 F.3d at 1520 (identifying "the six-county Denver Metropolitan Statistical Area" as one acceptable geographical region for inquiry into an affirmative action measure by the City and County of Denver). That said, Adarand's concern with the availability of DBEs in a particular market is certainly an important one, *see Croson*, 488 U.S. at 502,

2. Evidence Required to Show Compelling Interest

While the government's articulated interest is compelling as a theoretical matter, we must yet determine whether the actual evidence proffered by the government supports the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. Generally,

> [a]bsent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool.

Id. at 493 (Op. of O'Connor, J.); *see also Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." (quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)) (further citations omitted)).

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and, as discussed below, the lack of evidence provided by the government regarding local availability and the government's concomitant failure to tailor contracting regulations accordingly constitute one of the chief barriers to finding the previous statutory and regulatory scheme narrowly tailored.

Our "benchmark for judging the adequacy of the government's factual predicate for affirmative action legislation [i]s whether there exists a '*strong basis in evidence* for [the government's] conclusion that remedial action was necessary.' " *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *See Concrete Works*, 36 F.3d at 1520-21.

> Although Croson places the burden of production on the [government] to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before [the government] may take affirmative steps to eradicate discrimination.

Id. at 1522 (citing *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring)). After the government's initial showing, the burden shifts to Adarand to rebut that showing: "Notwithstanding the burden of initial production that rests" with the government, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* (quoting *Wygant*, 476 U.S. at 277-78 (plurality)). "[T]he nonminority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* at

1522-23 (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)).

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, we consider both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *See Concrete Works*, 36 F.3d at 1521, 1529 n.23 (considering post-enactment evidence).[11] Furthermore, we may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *See Id.* at 1523, 1529; *see also Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

It is with the foregoing principles in mind that we turn to an examination of the evidentiary basis on which Congress relied to support its finding of discrimination and continuing effects of past discrimination against minorities in the publicly-funded and private construction industry.

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[11] Post-enactment evidence is particularly relevant when, as here, it was gathered specifically to respond to the Supreme Court's *Adarand III* decision, which applied a new compelling interest standard to the federal government's affirmative action programs. *See Appendix – The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050 (1996) (noting purpose of responding to *Adarand III*).

3. Evidence in the Present Case

There can be no doubt that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts – especially construction contracts – necessitating a race-conscious remedy. *See, e.g., Appendix – The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050, 26,051-52 & nn.12-21 (1996) (*"The Compelling Interest"*) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered.

Of course, statements made with regard to discrimination in the subcontracting industry by congressional reports and by members of Congress are insufficient in themselves to support a finding of compelling interest. We must probe more deeply into the legislative history of the enactments at issue. We cannot merely recite statements made by members of Congress alleging a finding of discriminatory effects and the need to address those effects, such as the following:

> Where there are no DBE programs, women and minority-owned small businesses are shut out of the highway construction. The Federal DBE program serves to redress the inequality and redress the unfortunate fact that all across the country women and minorities would not otherwise have access to construction contracts.

144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun). Such findings are not enough to satisfy strict scrutiny standards. *See Croson*, 488 U.S. at 500 ("[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." (citing *McLaughlin v. Florida*, 379 U.S. 184, 190-92 (1964))). The question that Croson requires us to ask is whether there is a strong basis in evidence to support the legislature's conclusion.

In *Concrete Works*, we noted that

> Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality's showing that "it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race- and gender-conscious program.

Concrete Works, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the

federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. Discussion of each of those bodies of evidence follows.[12]

a. Barriers to Minority Business Formation in Construction Subcontracting

As to the first kind of barrier, the government's evidence consists of numerous congressional investigations

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[12] In the discussion that follows, we take judicial notice of the content of hearings and testimony before the congressional committees and subcommittees cited by the government. Furthermore, we note in passing that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by the government. *See, e.g., Barriers to Full Minority Participation in Federally Funded Highway Contracts: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong. (April 1, 1998); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Commerce, Consumer, & Monetary Affairs Subcomm. of the House Comm. on Gov't Operations*, 103d Cong. (July 12, 1993).

and hearings as well as outside studies of statistical and anecdotal evidence – cited and discussed in *The Compelling Interest*, 61 Fed. Reg. 26,054-58 – and demonstrates that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide.

The evidence demonstrates that prime contractors in the construction industry often refuse to employ minority subcontractors due to "old boy" networks – based on a familial history of participation in the subcontracting market – from which minority firms have traditionally been excluded. *See* H.R. Rep. 103-870 15 n.36 (1994) ("[T]he construction industry is . . . family dominated. Many firms are in their second or third generation operating structures. Minorities and women, unless they are part of construction families, have been and will continue to be excluded whenever possible."); *The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson: Hearing Before the Legislative & Nat'l Sec. Subcomm. of the House Comm. on Gov't Operations*, 100th Cong. 111 (1990) (*"The Significance of Croson"*) (statement of Manuel Rodriguez, President, R & D Development, Inc., specializing in mechanical construction, and past president and founder of the National Hispanic Association of Construction Enterprises) ("[F]ew [minorities] today have families from whom they can inherit a construction business."); *see also Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 & H.R. 1807 Before the Senate Comm. on Small Bus.*, 100th Cong. 127 (1988) (statement of Parren Mitchell, Chairman, Minority Business Enterprise Legal

Defense and Education Fund) (noting the "harsh reality" of the "old-boy network" that prevents minority-owned firms from breaking into the private sector); H.R. Rep. No. 103-870 15 & n.36 (1994) (discussing evidence of the discriminatory exclusion of minority firms from business networks); *The Compelling Interest*, 61 Fed. Reg. at 26,057 & nn.82-83 (citing studies explaining minorities' exclusion from the construction trades as a result of the lack of familial connections).

Furthermore, subcontractors' unions place before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *See Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong. 203 (1985) (testimony of James Haughton, President, Fight Back) (minority contractors continue to "suffer[ ] very heavily because they have been victims to that discrimination as practiced by the unions"); *The Significance of Croson* at 117-19 (statement of Manuel Rodriguez) (describing the way in which union discrimination prevents access to skills and experience needed to form a business); *The Compelling Interest*, 61 Fed. Reg. at 26,055-56 & nn.53 & 62 (citing studies of statistical and anecdotal evidence finding racism by construction trade unions in several cities and states and concluding that racism is a major cause of the lack of minority business formation in the construction industry).

The government's evidence is particularly striking in the area of the race-based denial of access to capital,

without which the formation of minority subcontracting enterprises is stymied. *See, e.g., Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Fin. Insts. Supervision, Regulation & Deposit Ins. of the House Comm. on Banking, Fin. & Urb. Affs.*, 103d Cong. 19-20 (1994) (statement of Toni Hawkins, Executive Director, National Black Business Counsel) (noting the existence and examples of discrimination in business lending); *id.* at 27 (statement of Wayne Smith, Chairperson, Black Urban Alliance: African American Chamber of Commerce of Newark, NJ) (stating that while perhaps more subtle than discrimination in mortgage lending, discrimination in business lending exists); *id.* at 209 (statement of M. Harrison Boyd, President/CEO, HBA Management Services Group, Inc.) (White bank employees "have been, and are continually, programmed to perceive minority business loans as bad business, and/or at a minimum, risky and less desirable."); H.R. Rep. No. 103-870 7 (1994) ("There is a widespread reluctance on the part of the commercial banking, venture capital, . . . and capital markets to take the same risk with a [minority] entrepreneur that they would readily do with a white one." (quoting testimony of Sherman Copelin, President of the National Business League)); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearing Before the Subcomm. on Procurement, Innovation, and Minority Enter. Dev. of the House Comm. on Small Bus.*, 100th Cong. 26 (1988) (statement of Joann Payne, President, PSM Consultants) ("[B]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans. . . . "); *The Disadvantaged Business*

Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the Senate Comm. on Env't & Pub. Works, 99th Cong. 363 (1985) (statement of James K. Laducer, Director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center) (North Dakota banks "refuse to lend monies to minority businesses from nearby Indian communities."); *Fiscal Economic & Social Crises Confronting American Cities: Hearings Before the Senate Comm. on Banking, Housing, & Urb. Affs.*, 102d Cong. 431 (1992) (statement of Anthony Robinson, President, Minority Business Enterprise Legal Defense and Education Fund) ("[T]he legitimate capital needs of the minority business community are ignored or held to such a higher underwriting standard and systematically denied venture capital."); *Federal Minority Business Programs: Hearing Before the House Comm. on Small Bus.*, 102d Cong. 89 (1991) (statement of Joshua I. Smith, Chairman, U.S. Commission on Minority Business Development) (attaching *Interim Report 1990* of the United States Commission of Minority Business Development, which states minority business owners' "access to credit ha[s] been historically limited"); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the Gen. Econ. & Minority Enter. Dev. of the House Comm. on Small Bus.*, 101 Cong. 26 (1989) (statement of Cleveland M. Chapman, President, Midwest Contractors For Progress) (citing statistics demonstrating discrimination in lending in Chicago). For example, "[t]he average loan to a black-owned construction firm is $49,000 less than the average loan to an equally matched nonminority construction firm." *The Compelling Interest*, 61 Fed. Reg. at 26,058 &

n.91 (citing Grown & Bates, *Commercial Bank Lending Practices & the Development of Black-Owned Construction Companies.*, 14 J. Urb. Aff. at 34 (1992)). "All other factors being equal, a black business owner is approximately 15 percent less likely to receive a business loan than a white owner." *Id.* at 26,058 & n.90 (citing Faith Ando, *Capital Issues and the Minority-Owned Business*, 16 Rev. Black Pol. Econ. at 97 (1988)). Another study

> surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites. The denial rate for Hispanic owners was 1.5 times as high as white owners. Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size and net worth of the business. The study concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial."

Id. at 26,058 (footnotes omitted) (citing The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* v (1996)). Such findings strongly support an initial showing of discrimination in lending; and we take judicial notice of the obvious causal connection between access to

capital and ability to implement public works construction projects.[13]

b. Barriers to Competition by Existing Minority Enterprises

With regard to barriers faced by existing minority enterprises, the government presents evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts.

The government presents powerful evidence that

> [a]ll too often, contracting remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work. Because minority owned firms are new entrants to most markets, the existence and proliferation of these relationships locks them out of subcontracting opportunities. As a result, minority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements.

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[13] Lending discrimination alone of course does not justify action in the construction market. *See Croson*, 488 U.S. at 510 (Op. of O'Connor, J.) (noting a municipality's alternative remedy of taking direct action against discrimination in the provision of credit). However, the persistence of such discrimination, which is *already* unlawful under federal law, supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.

The Compelling Interest, 61 Fed. Reg. 26,058 & nn.98-99 (footnotes omitted) (citing studies of statistical and anecdotal evidence of minority business participation in state and local construction industries). The government has also presented sobering evidence that

> when minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. This sort of exclusion is often achieved by white firms refusing to accept low minority bids or by sharing low minority bids with another subcontractor in order to allow that business to beat the bid (a practice known as "bid shopping").

Id. at 26,058-59 (citing studies of statistical and anecdotal evidence detailing bid shopping in several localities).

It is clear to us that Congress has devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of the non-minority firms in the construction industry. *See, e.g., How State and Local Governments Will Meet the Croson Standard (Minority Set-Asides): Hearing Before the Subcomm. on Civ. & Const. Rights of the House Comm. on the Judiciary*, 100th Cong. 53-54 (1989) (statement of Marc Bendick, Bendick & Egan Economic Consultants, Inc.) ("[W]e must not for a moment underestimate the role of continuing pervasive blunt discrimination by the private market. . . . The same prime contractor who will use a minority subcontractor on a city contract and will be terribly satisfied with the firm's performance, will simply not use that minority subcontractor on a private contract where the

prime contractor is not forced to use a minority firm."); *The Significance of Croson* at 121-22 (statement of Manuel Rodriguez); *id.* at 104-06 (statement of E.R. Mitchell, Jr., President of E.R. Mitchell Construction Company and President of the Atlanta Chapter of the National Association of Minority Contractors) (identifying racially discriminatory actions by federal and state government agencies in the bidding process on construction contracts).

The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *See, e.g., The Significance of Croson* at 107 (statement of E.R. Mitchell, Jr.) ("[Q]ualified black firms are outside the business network of established white firms. By virtue of being outsiders to their communications loop, it is impossible to successfully bid because we remain forever strangers to white owners and developers."); *The Compelling Interest*, 61 Fed. Reg. at 26,059-60 & nn.107, 109-110 (citing studies and articles on statistical and anecdotal evidence demonstrating discriminatory treatment in the bidding process).

Minority subcontracting enterprises in the construction industry find themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presents evidence both that bonding is an essential requirement of participation in federal subcontracting procurement, *see The Compelling Interest*, 61 Fed. Reg. at 26,060 (citing 40 U.S.C.

§§ 270a-270e), and a "vicious circle" whereby minority subcontractors cannot obtain bonding due to lack of experience, and "since they cannot get bonding, they cannot get experience," *The Compelling Interest*, 61 Fed. Reg. at 26,060 (footnote omitted). *Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong., 1st Sess. 159 (1985) (statement of Sherman Brown, President, MCAP, Inc.) ("Virtually everyone connected with the minority contracting industry . . . apparently agrees that surety bonding is one of the biggest obstacles in the development of minority firms."). The government additionally presents evidence of an insular "old-boy" network in bonding that excludes minority firms. *See, e.g.*, H.R. Rep. No. 103-870 at 15 & n.36. There is also strong evidence of overt racial discrimination in the bonding market. *See, e.g., Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enter., Fin. & Urb. Dev. of the House Comm. on Small Bus.*, 103d Cong. 2 (1993) (statement of John B. Cruz, III, President, John B. Cruz Construction Co.) (describing racial discrimination his company suffered in its efforts to obtain bonding); *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-Owned Bus. Dev. of the Senate Comm. on Small Bus.*, 101st Cong. 40-41, 43 (1990) (statement of Andrew Brimmer, President, Brimmer and Company, Inc., Economic and Financial Consultants) (presenting the results of a study showing discrimination in bonding faced by African-American, Hispanic, and Pacific-Islander-owned firms in the Atlanta area); *id.* at 165-66 (statement of

Edward W. Bowen, Project Administrator, Prentiss Properties, Ltd.) (noting that unclear bonding standards permit denials of bonding that are arbitrary and capricious and racially-biased); *Disadvantaged Business Set-Asides in Transportation Construction Projects, supra*, at 107 (statement of Marjorie L. Herter, National President, Women Construction Owners & Executives, USA; President, Vee See Construction Co.) ("Discrimination against women and minorities in the bonding market is quite prevalent."); *The Compelling Interest*, 61 Fed. Reg. at 26060 & n.118 (citing studies of statistical and anecdotal evidence of widespread racial discrimination in bonding). For example, the government cites a Louisiana study according to which "minority firms were nearly twice as likely to be rejected for bonding, three times more likely to be rejected for bonding for over $1 million, and on average were charged higher rates for the same bonding policies than white firms with the same experience level," *The Compelling Interest*, 61 Fed. Reg. at 26,060 & n.119 (citing D.J. Miller & Associates, 2 *State of Louisiana Disparity Study* at 35-57 (1991)), while an Atlanta study found similarly glaring disparities in the ability of minority versus non-minority construction firms to obtain bonding generally and "unlimited bonding" in particular, Andrew F. Brimmer & Ray Marshall, *Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia* at 19-20 (1990) (cited in *City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urb. & Minority-owned Bus. Dev. of the Sen. Comm. on Small Bus.*, 101st Cong. 193-94 (1990)).

Finally, the government presents evidence of discrimination by suppliers, the result of which is that

nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors, driving up "anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 26,061; *see also id.* at n.123 (citing studies detailing discrimination by suppliers); *The Significance of Croson* at 106 (statement of E.R. Mitchell, Jr.) ("[C]ommon suppliers working on projects routinely give white subs better prices for materials than they do black subs.").

Contrary to Adarand's contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the government's evidence as to the kinds of obstacles minority subcontracting businesses face constitutes a strong basis for the conclusion that those obstacles are not "the same problems faced by any new business, regardless of the race of the owners." (Appellee's Br. at 28.)

c. Local Disparity Studies

Following the Supreme Court's decision in *Croson*, numerous state and local governments have undertaken statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *See The Compelling Interest*, 61 Fed. Reg. at 26,061-62 (presenting the Urban Institute's analysis of thirty-nine disparity studies); *see also* 144 Cong. Rec. S5413-14 (May 22, 1998) (statement of Senator Chafee) (discussing a disparity study conducted for CDOT that found "a disproportionately small number

of . . . minority-owned contractors participating in Colorado's transportation construction industry. . . . Hispanic firms received less than one-half of one percent (.26%). . . . The vast majority of contracts – more than 99 percent – went to firms owned by white men."). The government's review of those studies reveals that although such disparity was least glaring in the category of construction subcontracting, even in that area "minority firms still receive only 87 cents for every dollar they would be expected to receive" based on their availability. *The Compelling Interest*, 61 Fed. Reg. at 26,062. In that regard, the Croson majority stated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government's] prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted). We are certainly mindful that "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* at 501-02. But here, we are unaware of such "special qualifications" aside from the general qualifications necessary to operate a construction subcontracting business. At a minimum, the disparity indicates that there has been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before us that those minority subcontractors who *have* been utilized have

performed inadequately or otherwise demonstrated a lack of necessary qualifications.

The disparity between minority DBE availability and market utilization in the subcontracting industry raises an inference that the various discriminatory factors the government cites have created that disparity. In *Concrete Works*, we stated that "[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely . . . on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion," and we do not see *Adarand III* as requiring any different standard in the case of an analogous suit against the federal government. 36 F.3d at 1528.[14] Although the

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[14] We reject the decidedly vague urgings of Adarand's amici curiae to reject disparity studies generally as biased and/or insufficiently reliable. Certainly, the conclusions of virtually all social scientific studies may be cast into question by criticism of their choice of assumptions and methodologies. The very need to make assumptions and to select data sets and relevant variables precludes perfection in empirical social science. However, general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and neither compels us to discount the disparity evidence presented in the government's appendix nor does it create "a legitimate factual dispute about the accuracy of [the government's] data." *Concrete Works*, 36 F.3d at 1528 (refusing to grant summary judgment because of a legitimate factual dispute about the accuracy of disparity study data). Moreover, a generalized assertion that disparity studies lack reliability is in conflict with *Croson*, which suggests that disparity studies are entirely relevant to an assessment of whether sufficiently strong evidence exists to support a compelling interest in a race-conscious remedy. *See* 488 U.S. at

government's aggregate figure of a 13% disparity between minority enterprise availability and utilization is

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501; *Concrete Works*, 36 F.3d at 1528 ("[O]nce credible information about the size or capacity of the firms is introduced in the record, it becomes a factor that the court should consider."). Adarand and its amici curiae misinterpret the case law they cite for the proposition that disparity studies are invalid. For example, with regard to *Coral Construction Co. v. King City*, 941 F.2d 910, 921 (9th Cir. 1991), we agree with the Ninth Circuit that the challengers of a DBE program should have the opportunity to rebut statistical evidence. In the present case, Adarand has had such an opportunity both in the district court below, *see Adarand IV*, 965 F. Supp. at 1573-77, and before this Court on appeal, but has failed to present a rebuttal other than an unfocused attack on disparity studies generally. Relying on *Coral Construction Co.*, Adarand's amici further argue the disparity studies were not introduced into evidence and not rebutted; however, the amici do not, and presumably cannot, cite the portion of the record where Adarand objected on that ground to the introduction of the studies via *The Compelling Interest*, 61 Fed. Reg. 26,050, and their objection has been waived. *See Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1502 (10th Cir. 1994) (holding that where the appellant did not show, and the court of appeals could not find, where the issue was raised in the trial court below, the issue was not properly before the court of appeals and would not be considered); *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (holding that as a general rule, the court of appeals will not consider an issue that was not raised below). As for *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1416 (9th Cir. 1991), the court in that case held the statistical evidence presented was sufficient on the facts to establish compelling interest. *Contractors Association of Eastern Pennsylvania*, 6 F.3d at 1005, stated that "[d]isparity indices are highly probative evidence of discrimination." On further appeal in that case, the Third Circuit stated that whether disparity studies provided the requisite strong basis in evidence for upholding the race-

not overwhelming evidence, it is significant. It is made more significant yet by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. Of course, it would be "sheer speculation" to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.[15]

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conscious program at issue was a "close call" but did not decide the question. *Contractors Ass'n of E. Penn., Inc. v. City of Philadelphia*, 91 F.3d 586, 605 (3d Cir. 1996). Finally, *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 903-05, 924 (11th Cir. 1997), can be distinguished on the grounds that the court of appeals affirmed the district court's factual findings which rejected evidence from disparity studies under the deferential "clear error" standard of review. Here the district court committed no clear error in its finding of compelling interest based on the statistical evidence before it. To the extent the foregoing cases may be otherwise interpreted, we reject their holdings.

[15] Based on a comprehensive review of 1987 census data showing disproportionately low minority business ownership and receipts for minority-owned business, the U.S. Commission on Minority Business Development concluded that "minorities are not underrepresented in business because of choice or chance. Discrimination and benign neglect is the reason why our economy has been denied access to this vital resource." United States Commission on Minority Business Development, *Final Report* 60 (1992).

d. Results of Removing Affirmative Action Programs

We take notice of an additional source of evidence of the link between compelling interest and remedy. There is ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *See, e.g.*, 144 Cong. Rec. S1421 (March 5, 1998) (statement of Sen. Moseley-Braun) (citing statistics); *The Compelling Interest*, 61 Fed. Reg. 26,062 & nn.130-134 (citing studies). Although that evidence standing alone is not dispositive, it strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Croson*, 488 U.S. at 509 (Op. of O'Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, we conclude that the government has met its initial burden of presenting a "strong basis in evidence" sufficient to support its articulated, constitutionally valid, compelling interest. *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

4. Adarand's Rebuttal

Adarand and the amici curiae supporting it have utterly failed to meet their "ultimate burden" of introducing credible, particularized evidence to rebut the government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market.[16] *Concrete Works*, 36 F.3d at 1522 (quoting *Wygant*, 476 U.S. at 277). Its assertions as to the general impermissibility of a race-conscious remedy regardless of the compelling interest identified by Congress are not in accordance with equal protection jurisprudence. It is simply an untenable interpretation of Equal Protection Doctrine to insist that the Constitution requires Congress to acquiesce in the workings of an ostensibly free market that would direct the profits to be gleaned from disbursements of public funds to nonminorities alone. *See Concrete Works*, 36 F.3d at 1519 ("[T]he Fourteenth Amendment permits race-conscious programs that seek . . . to prevent the public entity from acting as a ' "passive participant" in a system of racial exclusion . . . ' by allowing tax dollars 'to finance the evil of private prejudice.' " (quoting *Croson*, 488 U.S. at 492));

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[16] We disagree with Adarand's contention that the government's "Appendix I" to its motion for summary judgment (Appellants' App. at 44-53) is insufficient evidence of Congress's findings. The Appendix references and discusses the long and comprehensive legislative history and findings on discrimination in the nationwide construction contracting market. Adarand's challenge to that history is too conclusory to meet its burden under *Concrete Works*.

see also Adarand III, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

We reject Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous "disparity studies" cited by the government and its amici curiae as supplemental evidence of discrimination.[17] The evidence cited by the government and its amici curiae and examined in this opinion only reinforces the conclusion that "racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation's contracting markets." *The Compelling Interest*, 62 Fed. Reg. at 26,062. In *Concrete Works*, 36 F.3d at 1530-31, the plaintiff "specifically identified" and "put forth evidence" showing "flaws" in the data justifying the

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[17] *Adarand III* called into question *Fullilove's* standard of review and possibly its result. However, as far as we can ascertain, nothing in *Adarand III* undermines the conclusion of the lead *Fullilove* opinion that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-78 (Op. of Burger, C.J.); *see also Croson*, 488 U.S. at 504 ("[In the *Fullilove* case,] Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. . . . Congress has made national findings that there has been societal discrimination in a host of fields.").

City of Denver's affirmative action program, thus precluding summary judgment on the issue of compelling interest. Here, by contrast, the government's evidence permits a finding that as a matter of law Congress has the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. This evidence demonstrates that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises – both discussed above – are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. Furthermore, Congress is not limited to simply proscribing federal discrimination against minority contractors, as it has obviously already done. The Constitution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice.[18]

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[18] We likewise reject Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. If Congress has valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. "Race" is often a classification of dubious validity – scientifically, legally, and morally. We need not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637(d)(3)(C).

The evidence at issue is not, as Adarand would have it, merely evidence of generalized societal discrimination. *See Wygant*, 476 U.S. at 276 (Op. of Powell, J.) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."). Rather, it is evidence of specific barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts. In short, the construction contracting market is overwhelmingly composed of non-minorities due to the effects of racial discrimination.

We do not intend to suggest that the evidence cited by the government is unrebuttable. We merely point out that under our precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. We reiterate that "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277-78 (plurality)). "[T]he non-minority [challengers] . . . continue to bear the ultimate burden of persuading the court that [the government entity's] evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.* (quoting *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring)). Because Adarand has failed utterly to meet its burden, the government's initial showing stands.

In sum, guided by *Concrete Works*, we conclude that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed. Reg. 26,050, more than satisfies the government's burden of production regarding the compelling interest for a race-conscious remedy. Congress has a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. We therefore affirm the district court's finding of a compelling interest.

C. Narrow Tailoring

We turn now to the question of narrow tailoring. Here, again, we must first define "narrow tailoring" for purposes of strict scrutiny and then determine whether the SCC program in the present case falls within that definition.

1. "Narrow Tailoring" in Race-conscious Programs Defined

We are guided in our inquiry by the handful of Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

> [i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Paradise, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted). Regarding flexibility, "the availability of waiver" is of particular importance. *Id.* As for numerical proportionality, *Croson* admonishes us to beware of the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (quoting *Sheet Metal Workers*, 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)). In that context, a "rigid numerical quota" particularly disserves the cause of narrow tailoring. *Id.* at 508.[19] Finally, as for burdens imposed on third parties, a plurality of the Court in *Wygant* stated:

> As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the

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[19] While *Paradise* only assumed without deciding that strict scrutiny is the appropriate standard, *see* 480 U.S. at 166-67 (plurality), it nevertheless applied strict scrutiny to affirm a race-conscious relief measure, *see id.* at 185-86. Although the *Paradise* factors require some modification in order to be used for evaluating the nationwide legislative enactment and its implementing regulations and programs at issue here (as opposed to a judicial order aimed at a particular police department), they provide some general guidance on questions the Court considers relevant to the narrow tailoring inquiry. *See also Adarand III*, 515 U.S. at 237 (citing the opinions of Justices Brennan, Stevens, and O'Connor in *Paradise* "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact' " (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring))).

> remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

476 U.S. at 280-81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Justice O'Connor's majority opinion in *Croson* adds a further factor to our analysis: under- or over-inclusiveness of the DBE classification. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination. . . . [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508 (citation omitted). Thus, we must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad – or too narrow – a brush.

More specific guidance is found in *Adarand III*. In remanding for strict scrutiny, the Court identified two questions apparently of particular importance in the instant case: (1) "[c]onsideration of the use of race-neutral means;" and (2) "whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate." *Adarand III*, 515 U.S. at 237-38 (internal quotations and citations omitted). We

thus direct our attention to an analysis of the program in light of *Adarand III*'s specific questions on remand, and the foregoing narrow-tailoring factors, in the following order: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness.

2. Race-neutral Alternative Remedies

The first factor to be considered is that of the availability of alternative remedies to the race-conscious measures at issue. The district court in *Adarand IV* found, and Adarand does not challenge its finding, that Congress over a period of decades attempted to correct by race-neutral means the problem of too few minority subcontractors for government construction contracts, and only after it continued to find discriminatory effects did it first implement a race-conscious remedy. *See Adarand IV*, 965 F. Supp. at 1582-83; *see also Croson*, 488 U.S. at 507 (noting the finding in *Fullilove* that "Congress . . . carefully examined and rejected race-neutral alternatives before enacting the MBE set-aside").[20] That finding

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[20] Although the standard of review and result of *Fullilove* have been called into question by *Adarand III*, the district court noted, in our view correctly, that a square majority of the Court in *Croson* cited with approval the principal opinion in *Fullilove* for this factual finding. We fail to see how this factual aspect of *Fullilove* has been impaired; Adarand offers no authority to refute the finding that three decades of race-neutral measures failed to have any appreciable effect on the exclusion of minorities from the receipt of government highway largesse.

is law of the case and is not clearly erroneous. *See Agostini*, 521 U.S. at 236; *McIlravy*, 204 F.3d at 1034-35. The long history of discrimination in, and affecting, the public construction procurement market – despite the efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures – places a formidable burden on both existing and would-be minority participants and thus justifies race-conscious action to address a decidedly racial disparity.

A separate question, however, is whether the FLHP considered other more narrowly tailored measures before deciding to implement 15 U.S.C. § 644(g) by means of the SCC, with its race-based presumptions of disadvantage. The government's argument focuses on *Congress's* consideration of race-neutral measures prior to enacting its policy of maximizing opportunity for minority-owned and controlled businesses and setting aspirational goals for the participation of such businesses in federal contracting. Although *Congress* considered the futility of race-neutral measures prior to incorporating the aspirational goals into the SBA and the relevant appropriations measures, the government fails to address whether the *FLHP* considered either measures short of a race-conscious subsidy to prime contractors or a more refined means of assessing subcontractors' eligibility for race-conscious programs prior to promulgating the regulations implementing the SCC. The record persuades us

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Adarand offers no evidence to rebut the district court's conclusion that Congress entertained and indeed attempted years of race-neutral measures without success before resorting to the programs at issue in this lawsuit.

that under the high degree of solicitude for individual rather than race-based consideration mandated by the Court's strict scrutiny standard, the government has not shown that the FLHP adequately considered such alternative measures in the 1996 SCC program.

Again, the situation has since changed dramatically.[21] A comparison of that previous SCC program with the new federal regulations under TEA-21 is particularly instructive. The current, revised regulations instruct recipients that "[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation," 49 C.F.R. § 26.51(a) (2000); *see also* 49 C.F.R. § 26.51(f) (2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 C.F.R. § 26.51(b) (2000). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See* 49 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. The record before us does not indicate whether or not

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[21] The regulatory changes discussed below resulted from several years of study and consideration of *Croson* and *Adarand III*. *See* 64 Fed. Reg. 5096, 5101-03 (1999) (discussing how regulatory changes address the requirements of narrow tailoring).

FLHP considered race-neutral measures prior to resorting to the SCC. This absence weighs strongly against any finding of narrow tailoring. *See Adarand III*, 515 U.S. at 237-38; *Croson*, 488 U.S. at 507. The district court was therefore correct, given the information before it at the time, that the SCC program was not narrowly tailored, and should the government reinstitute the revised program without considering race-neutral measures similar to those outlined in 49 C.F.R. § 25.51(a) and (b) (2000), that program too would be insufficiently narrowly tailored.

3. Appropriate Limit on Duration

A second important factor in any narrow-tailoring analysis is a limit on the duration of the race-conscious measures at issue. The district court declined to address this aspect of the Supreme Court's inquiry on remand because of the court's finding that the 1996 SCC program was not narrowly tailored for other reasons. *See Adarand IV*, 965 F. Supp. at 1584. Although we agree for different reasons that the 1996 program the district court considered was insufficiently narrowly tailored to pass constitutional muster, the factor of limited duration is mentioned in *Adarand III*, 515 U.S. at 238, and we accept the Court's invitation to consider this factor now.

The duration of a particular company's DBE status is limited by statute and regulation to approximately ten-and-one-half years under the § 8(a) certification program. *See* 15 U.S.C. §§ 634(b)(6), 636(j)(10)(C)(i), 637(a), (d); 13 C.F.R. § 124.110 (1996); 13 C.F.R. § 124.2 (2000). Moreover, each participant in the § 8(a) program is required to

annually submit financial and other information, on the basis of which the SBA reevaluates and may "graduate" a small disadvantaged business from the program as no longer qualified (e.g., because the criteria of economic disadvantage are no longer met). *See* 15 U.S.C. §§ 636(j)(10)(G), 637(a)(6)(B), (C). The § 8(a) program's inherent time limit and graduation provisions ensure that it, like the program upheld in *Paradise*, is carefully designed to "endure[ ] only until . . . the discriminatory impact" has been eliminated; once a DBE loses its economic disadvantage, it loses its certification. *Paradise*, 480 U.S. at 178. As far as we can ascertain from the regulations previously in effect, the § 8(d) program did not have an analogous individual time limit. Therefore, insofar as the 1996 SCC program relied on § 8(a) criteria, those criteria increased the narrow tailoring of the program. However, insofar as the program relied on § 8(d) criteria, through state certifications,[22] we discern no evidence that the specific criteria of DBE eligibility provide a temporal limit to the program. Thus, insofar as the district court suggested that an SCC program based on § 8(a) criteria would be insufficiently narrowly tailored, we disagree; the court's skepticism about the fatality in fact of strict scrutiny in the narrow-tailoring context is contrary to the Supreme Court's own pronouncements in both *Adarand III*, 515 U.S. at 237, and *Croson*, 488 U.S. at 509.

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[22] Notably, Gonzalez was certified through such a state program in the present case, belying the government's argument that there was no evidence of unconstitutional state certifications under the version of § 8(d) in place at the time this litigation commenced.

In this respect, too, we note that the government has modified its unconstitutional practices. The current § 8(d) program regulations specifically incorporate the certification requirements from the Small Business Administration regulations implementing the § 8(a) program. *See* 48 C.F.R. § 19.001 (2000) (incorporating certification requirements of 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt. A). The regulations incorporated into the § 8(d) program provide for a certification of a business as socially and economically disadvantaged for three years after either the initial certification or other administrative determination. *See* 13 C.F.R. § 124.1014 (2000). If a business wishes to remain certified for longer than three years, it must "submit a new application and receive a new certification." *Id.* § 124.1014(c).[23] Therefore, with regard to appropriate limitations on duration, the current DBE certification programs are narrowly tailored.

Finally, we note that Congress extensively debated whether to renew the DBE program prior to passing TEA-21 in 1998. *See, e.g.*, 144 Cong. Rec. S1481-06, S1481-96 (March 6, 1998); *id.* S1395-01, S1395-434 (March 5, 1998); *id.* H1885-04, H2000-11 (Apr. 1, 1998). These debates, in addition to the limited duration of th DBE

[23] Although the § 8(a) program provides for annual rather than tri-annual review of DBE certification, for purposes of the "duration" prong of the narrow-tailoring inquiry, that difference is not so glaring as to require striking down the § 8(d) program; rather, it is the periodic reevaluation of disadvantaged status that renders this aspect of the program narrowly tailored because in that way, the program will not last longer than the situation it seeks to correct.

program in accordance with the limited duration of TEA-21 and other highway appropriations statutes like it, indicate that the race-conscious programs at issue are "appropriately limited" to last no longer than "the discriminatory effects [they are] designed to eliminate." *Adarand III*, 515 U.S. at 238 (quotation omitted).

4. Additional Narrow-Tailoring Factors

Although they were not emphasized by the *Adarand III* Court, we deem the other factors discussed in *Paradise*, 480 U.S. at 171, and *Croson*, 488 U.S. at 507-08, to be of value in the narrow tailoring analysis, and we turn to them now.

a. Flexibility

The 1996 SCC program, providing a subsidy for the use of DBEs, is certainly more flexible than the set-asides considered in either *Fullilove* or *Croson* because the program is not mandatory. It does not require the use of DBEs in subcontracting against the will of the prime contractor. *See Adarand IV*, 965 F. Supp. at 1583 (finding that the prime contractor's choice to avail itself of the SCC is "more flexible than the 'rigid racial quota' struck down in *Croson*, 488 U.S. at 499, and the 10 percent set aside upheld in *Fullilove*, 448 U.S. at 513-14").[24] Moreover,

[24] None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. § 637(d)(4), pertains to the SCC. However, even if § 8(d)(4) were relevant here, that would not change our conclusion that the SCC is not mandatory in nature. Section

the 1996 SCC program incorporates an additional element of flexibility – "the availability of waiver," *Paradise*, 480 U.S. at 171 – because any prime contractor is free not to take advantage of the clause and will never be required to make a "gratuitous" choice of subcontractors, *id.* at 178. With regard to flexibility, the 1996 program passes muster under a narrow-tailoring analysis.

Nothing has changed in this regard from 1996 until the present that would militate the contrary conclusion. On the contrary, the present version of the regulations have increased the flexibility of the government's DBE programs: An express waiver provision has been added to the current regulations. *See* 49 C.F.R. § 26.15 (2000) (allowing recipients of federal highway construction funds to seek waivers and exemptions, despite the already non-mandatory nature of DBE programs).

8(d)(4)(E) informs government agencies letting contracts that they are "*authorized* to provide such incentives as such Federal agency *may deem appropriate* in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract." 15 U.S.C. § 637(d)(4)(E) (emphasis added). This language demonstrates that § 8(d)(4) merely authorizes, but does not require, the use of incentives (of whatever type) to further the aspirational goals of increased participation in government contracts by socially and economically disadvantaged individuals. The fact that the FLHP has discontinued use of the SCC further demonstrates that § 8(d)(4) in no way requires an incentive clause in federal highway transportation contracts.

b. Numerical Proportionality

The essential question arising out of the numerical proportionality factor of *Paradise* is whether the aspirational goals of 5% in the SBA and 10% participation contained in STURAA, ISTEA, and TEA-21 are proportionate only if they correspond to an actual finding as to the number of existing minority-owned businesses. Despite involving a rigid quota rather than flexible and periodically adjusted aspirational goals, *Croson* may be read to suggest as much. *See Croson*, 488 U.S. at 507 (characterizing as "completely unrealistic" the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population" (citing *Sheet Metal Workers*, 478 U.S. 421 at 494 (O'Connor, J., concurring in part and dissenting in part))). However, because Congress has evidence that the effects of past discrimination have excluded minorities from the construction industry and that the number of available minority subcontractors reflects that discrimination, the *existing* percentage of minority-owned businesses is not necessarily an absolute cap on the percentage that a remedial program might legitimately seek to achieve. Absolute proportionality to overall demographics is an unreasonable goal. However, *Croson* does not prohibit setting an aspirational goal above the current percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole. This aspirational goal is reasonably construed as narrowly tailored to remedy past discrimination that has resulted in homogenous ownership within the industry. It is reasonable to conclude that

allocating more than 95% of all federal contracts to enterprises owned by non-minority persons, or more than 90% of federal transportation contracts to enterprises owned by non-minority males, is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid. *See Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

Apart from the reasonableness of the goals, the record before us supports the government's contention that the 5% and 10% goals incorporated in the statutes at issue here, unlike the set-asides in both *Fullilove* and *Croson*, are merely aspirational and not mandatory. *Cf. Croson*, 488 U.S. at 508 (finding no need "for a rigid numerical quota"). Therefore, while the goal may well be relevant to the numerical proportionality aspect of the *Paradise* strict scrutiny inquiry, we disagree with the district court that the goal itself is facially unconstitutional. Moreover, there is simply no showing that Adarand lost or will lose contracts due to the STURAA/ISTEA/TEA-21 10% goals for DBE participation, but rather only due to the over- or under-inclusive race-based presumptions involved in certification for 1996 SCC eligibility. Therefore, we conclude both that Adarand is without standing to mount any independent challenge to the 5% and 10% figures and that such a challenge is outside the scope of the Supreme Court's *Adarand III* remand. *See Adarand IV*, 965 F. Supp. at 1566 n.11 (noting that "Defendants maintain, and Adarand does not dispute, that the challenge in this action is based only on the use of the SCC to meet the various goals" established by the SBA, STURAA, and ISTEA).

We also conclude the government failed to carry its evidentiary burden in the district court insofar as the use of the 1996 SCC was based on an ill-defined 12-15% goal apparently adopted by the Federal Highway Administration ("FHA"). (*See* Appellants' App. at 187.) Unlike the congressionally-mandated goals that are supported by legislative history and supplemental evidence, we can find no explanation in the record before us of the basis in evidence on which the FHA relied in adopting this 12-15% goal (if in fact there is one). That congressional findings support the 5% and 10% aspirational goals in the SBA and transportation appropriation statutes, respectively, as well as the delegation of responsibility for setting individual goals to various agencies, does not vitiate the constitutional duty of those agencies to assure that the goals are supported by evidence that meets the requirements of *Croson* and *Concrete Works*. The complete absence of an explanation for the 12-15% goal in the record would have required granting summary judgment in favor of Adarand on the question of whether use of the 1996 SCC is narrowly tailored to meet the compelling interest determined by Congress.

Once again, however, comparison of the 1996 SCC to the current TEA-21 regulations is instructive and leads us to the conclusion that the recent regulatory changes preclude ruling in favor of Adarand at the present time for reasons beyond the abandonment of use of the SCC in federal highway construction contracting. The process by which recipients of federal transportation funding set aspirational goals is now much more rigorous. The current regulation instructs each recipient that its "overall goal must be based on demonstrable evidence of the

availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on [the recipient's] DOT-assisted contracts" and must make "reference to the relative availability of DBEs in [the recipient's] market." 49 C.F.R. § 26.45(b) (2000). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id.* § 26.45(c). Such evidence may include census data and valid disparity studies. *See id.* § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goal by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id.* § 26.45(d). When submitting a goal, the recipient must include a description of the methodology and evidence used. *See id.* § 26.45(f)(3). Significantly, the rigidity of even those realistic goals is negligible. Once the goals have been set, there is no requirement that the recipient actually meet them, merely that it make a good faith effort to do so: So long as good faith efforts were made, failure to meet a goal will not subject a recipient to penalties or to being held in noncompliance. *See id.* § 26.47(a). These new requirements that federal agencies rigorously examine, in a verifiable manner, the reasonableness of DBE programs given particular local conditions further ensure that government agencies will heed *Croson*'s mandate to avoid rigid application of DBE percentages in government contracting. *See* 488 U.S. at 507.

In sum, in conformity with the aspirational nature of the percentage goals of the relevant statutes, the current regulations emphasize that the 10% figure is nothing more than "an aspirational goal at the national level," 49

C.F.R. § 26.41(b) (2000), which "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level," *id.* § 26.41(c). Thus, in practice there are significant requirements currently in place that must be met by any recipient of federal highway construction funds before setting even an aspirational goal for DBE participation. There is little danger of arbitrariness in the setting of such goals, as was the case in *Croson*, 488 U.S. at 507.

c. Burden on Third Parties

As for the third *Paradise* factor, the burden on third parties is obviously significant enough to grant standing to Adarand. *See Adarand III*, 515 U.S. at 211-12. While there appears to be no serious burden on prime contractors, who are obviously compensated for any additional burden occasioned by the employment of DBE subcontractors, at the margin, some non-DBE subcontractors such as Adarand will be deprived of business opportunities. *See Wygant*, 476 U.S. at 280-81 (Op. of Powell, J.) ("When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, . . . a 'sharing of the burden' by innocent parties is not impermissible." (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted)). Insofar as the 1996 and current SCC programs are "limited in scope and duration, [they] only postpone[ ]" the hiring of non-DBEs, "impos[ing] a diffuse burden . . . foreclosing only one of several opportunities." *Paradise*, 480 U.S. at 183 (quoting *Wygant*, 476 U.S. at 283).

These further limitations have been incorporated: (1) Compensation under the SCC above 1.5-2% of the total contract is prohibited (*see* Appellants' App. at 56); (2) under the revised SCC, there is also a monetary limit to compensation under the program of $50,000-$100,000 (*see* Appellants' Supp. Br. Attach. 2 at 3). Thus, the subsidy is capped in such a way as to circumscribe the financial incentive to hire DBEs; after a fairly low threshold, the incentive for the prime contractor to hire further DBEs disappears.

Moreover, the current regulations are designed to increase the participation of non-minority DBEs. As to those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social disadvantage by those not so presumed may be shown by a preponderance of the evidence, rather than by the former "clear and convincing" standard. *Compare* 49 C.F.R. §§ 26.61(d), 26.67(d) (2000) and 13 C.F.R. § 124.105(c)(1) (2000) *with* 13 C.F.R. § 124.105(c)(1) (1996). The current regulations also require recipients to ensure that DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." 49 C.F.R. § 26.33(a) (2000).

While at the margin, some DBEs may be hired under the program in lieu of non-DBEs, the possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. To invalidate the

1996 and revised SCC and other government DBE programs on that basis would be to render strict scrutiny effectively fatal, in contravention of Justice O'Connor's clear statements to the contrary. *See Adarand III*, 515 U.S. at 237.

d. Over- or Under-Inclusiveness

The last factor we must consider in applying strict scrutiny in this case is that of the over- or under-inclusiveness of the programs at issue. One factor in the *Croson* Court's rejection of the Richmond Plan was the lack of "inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination." *Croson*, 488 U.S. at 508.

Even if a race-conscious *means* of achieving the goal of increasing minority participation is necessary, in promulgating the SCC in use at the time of the district court's decision in *Adarand IV*, defendants-appellants have not demonstrated that they considered the effectiveness of at least one other, less sweeping approach to implementing a race-conscious SCC program: disaggregating the presumptions of social and economic disadvantage, as is the case under the SBA § 8(a) program, to require a separate determination of social disadvantage and economic disadvantage. *See* 48 C.F.R. § 52.219-8 (1996). Requiring a separate showing as to each type of disadvantage would help address the Court's concern in *Croson* that a government entity undertake the necessary administrative effort "to tailor remedial relief to those who truly have suffered from the effects of prior discrimination." 488 U.S. at 508. The record does not disclose any

evidence that defendants undertook, and found to be unsuccessful, a program incorporating, as under § 8(a), a more individualized inquiry as to economic disadvantage prior to implementing the particular SCC program at issue in this litigation.

If the § 8(d) program in place prior to 1999 is interpreted, as we conclude it must be, to accord a presumption of economic as well as social disadvantage to minority individuals under § 8(d), while not doing so under § 8(a), that fact suggests that another more carefully tailored approach is available, i.e., the § 8(a) approach of individualized inquiry into economic disadvantage. The final section of *Adarand III*, 515 U.S. at 238-39, suggests the distinction is relevant. If individualized inquiry into economic disadvantage is sufficient to serve the purpose, why then dispense with such inquiry under § 8(d)? Indeed, if one can qualify under § 8(d), what is the significance of permitting qualification under § 8(a), aside from the practical matter of already including those DBEs enjoying § 8(a) benefits?

At the time *Adarand IV* originally was appealed in 1997, the government argued that the more lenient approach of § 8(d) is acceptable because of the differing purposes of § 8(a) and § 8(d).

> The [§] 8(a) program is targeted towards a smaller number of firms and provides direct assistance and protection from open competition over a period of years to help such firms become viable as prime contractors. By contrast, the [§] 8(d) program is focused on opening up federal subcontracting opportunities to a much larger

> number of small disadvantaged firms, and thus imposes less restrictive qualifications.

(Appellants' Br. at 34 (citing 13 C.F.R. § 124.06(b) (1997)).) That distinction, however, fails to identify why an individualized inquiry into economic disadvantage, which is admittedly practicable for § 8(a) purposes, was unnecessary for the particular purposes of § 8(d) prior to 1999. To put it simply, presuming economic disadvantage based on membership in certain racial groups does make § 8(d) "less restrictive," but it is not thereby narrowly tailored. The government fails to explain why it could not have used a non-race-based means of making § 8(d) "less restrictive." Therefore, we must conclude, under *Croson*, that the § 8(d) method of certification reviewed by the district court in *Adarand IV* is not narrowly tailored insofar as it obviates an individualized inquiry into economic disadvantage. *See Croson*, 488 U.S. at 508 (rejecting an affirmative action program in part because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination . . . [, and] the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification" (citation omitted)).

Requiring state certification standards to incorporate an individualized inquiry into economic disadvantage would certainly increase the burden on enterprises seeking DBE certification, as the government argues, and therefore would presumably reduce the pool of eligible enterprises. That increased burden, however, is slight when compared with the constitutional imperative to

avoid over- or under-inclusive racial classifications – the "Sultan of Brunei" scenario that troubled the district court, *Adarand IV*, 965 F. Supp. at 1581 n.17 ___, and the § 8(d) certification process thus fails to satisfy the narrow tailoring prong of the strict scrutiny inquiry. *Cf. Croson*, 488 U.S. at 508. When faced with the readily available alternative approach under § 8(a) of requiring would-be DBEs to provide a narrative statement of the economic disadvantage they have faced, combined with the various other more narrowly tailored alternatives discussed above, we fail to see how the SCC approach to certification in use at the time of *Adarand IV* satisfies the rigorous narrow tailoring requirement of the strict scrutiny calculus. In short, by inquiring into economic disadvantage on an individual basis, the program could avoid improperly increasing the contracting opportunities of those minority entrepreneurs whose access to credit, suppliers, and industry networks is already sufficient to obviate the effects of discrimination, past and present.

Yet again, the government has eliminated its offending 1996 practices. In particular, it has eliminated the discrepancy between the individualized determination of economic disadvantage characterizing the § 8(a) program and the non-individualized presumption of economic disadvantage characterizing the § 8(d) program. *See* 48 C.F.R. § 19.001 (2000) (providing that the § 8(d) program regulations expressly incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating § 8(a) criteria from 13 C.F.R. pt. 124, subpt.

A); *see also* 48 C.F.R. § 19.703 (2000) (eliminating the race-based presumption of economic disadvantage of the former regulation); *id.* § 52.219-8. The current regulations also impose a new requirement on applicants with regard to an individualized showing: They must submit a narrative statement describing the circumstances of that purported economic disadvantage. *See* 13 C.F.R. § 124.104(b)(1) (2000); *see also* 49 C.F.R. § 26.67(b)(1) (2000) (providing a net worth limit for DBEs under ISTEA and TEA-21); *id.* § 26.65(b) (stating that businesses exceeding a certain amount of gross receipts are ineligible for the DBE program). With the individualized determination of § 8(a) extended to economic disadvantage under § 8(d), the main obstacle to a finding of narrow tailoring has disappeared.

Thus, one of *Adarand III*'s "unresolved questions" has been answered, namely, whether the § 8(d) DBE certification program requires an individualized showing of economic disadvantage or whether the presumption applies to both social and economic disadvantage. *Adarand III*, 515 U.S. at 238. The 1996 § 8(d) certification program did not require an individualized showing of economic disadvantage, whereas the current § 8(d) certification program does require such an individualized showing.

There remains a further question of over- and under-inclusiveness that we must consider. The district court, *Adarand IV*, 965 F. Supp. at 1580, found that the 1996 SCC program was not narrowly tailored in part due to a failure to inquire into discrimination against each particular minority racial or ethnic group. The district court's opinion cites Adarand's arguments that "there is no evidence that Aleuts, Samoans or Bhutans [sic] have been

discriminated against in the Colorado construction industry." *Id.* Insofar as the district court held that the scope of the inquiry into the statutes generally was the Colorado construction industry alone, this is at odds with our holdings regarding compelling interest and Congress's power to enact nationwide legislation. Furthermore, as discussed below, because of the unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications, extrapolating findings of discrimination against Native Americans, Asian-Pacific Americans, and Asian-Americans to include Aleuts, Samoans, and Bhutanese, respectively, is more a question of nomenclature than of narrow tailoring. The Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications. While the concept of classifying human beings by race is distasteful, the fact remains that discrimination occurs based on such classifications, and engaging the classifications in order to eradicate such discrimination is a necessary evil which constitutes a compelling government interest.

We agree in principle that the 1996 SCC program would be more narrowly tailored had the CFLHD conducted an inquiry into the scope of discrimination within the region it administers as the current regulations

mandate.[25] However, the district court's ensuing conclusion appears to stem from a premise that a classification, to be narrowly tailored, must not only include minority individuals who have themselves suffered discrimination, but must also automatically include all non-minority individuals who have suffered disadvantage as well. *Cf. Fullilove*, 448 U.S. at 486 ("There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program."). Requiring that degree of precise fit would again render strict scrutiny "fatal in fact." *Id.* at 507 (Powell, J., concurring). We hold that such fatality is inconsistent with *Adarand III*, which re-affirmed *Paradise*, in its declaration that strict scrutiny was not fatal in fact. *See Adarand III*, 515 U.S. at 237. There can be a permissible middle ground in appropriate circumstances between the entirely individualized inquiry of a Title VII lawsuit, for

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[25] Nonetheless, the geographic scope of the remedial powers of a local government, as in *Croson*, and that of Congress's remedial powers under § 5 of the Fourteenth Amendment differ. *See Croson*, 488 U.S. at 488 (Op. of O'Connor, J.). In *Croson*, the City ignored the fact

> that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Id. at 490 (Op. of O'Connor, J.) (citations omitted).

example, and an unconstitutionally sweeping, race-based generalization. Indeed, the police officers receiving the benefit of the promotion policy in *Paradise* were not required to prove that they themselves *individually* were victims of past discrimination.[26]

Although we disagree with the district court's effectively fatal standard of scrutiny, we again note that comparison with the current SBA § 8(d) and TEA-21 regulations illustrates how the more careful tailoring now in place avoids some of the problems identified by the district court – again, the court's conclusion that the "Sultan of Brunei," should he have the temerity to apply, could qualify for DBE status. *Adarand IV*, 965 F.Supp. at 1581 n.17. *See* 13 C.F.R. § 124.104(c)(2) (2000); 48 C.F.R. § 19.001 (2000); 49 C.F.R. §§ 26.65, 26.67(b) (2000) (providing for an individual net worth limit for DBE certification). The current regulations more precisely identify the

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[26] Although the viability of *Fullilove* is uncertain, the *Fullilove* majority rejected a very similar overinclusiveness challenge to the 1977 10% MBE set-aside:

> It is also contended that the MBE program is overinclusive – that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case.

Fullilove, 448 U.S. at 486.

proper minority recipients of DBE certification by periodically re-screening for economic disadvantage all candidates for such certification. *See* 48 C.F.R. § 19.1014 (2000).

Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, we conclude that the 1996 SCC was insufficiently narrowly tailored as applied in this case and is thus unconstitutional under *Adarand III* 's strict standard of scrutiny. Nonetheless, after examining the current SCC and DBE certification programs, we conclude that the 1996 defects have been remedied, and the relevant programs now meet the requirements of narrow tailoring.

D. "Unresolved Question"

As a final matter, inasmuch as *Adarand III* suggests that an additional "unresolved question[ ]" concerning one of "the details of the complex regulatory regimes," 515 U.S. at 238, bears on the constitutionality of the SCC program, we address that question now: namely, whether there are differing definitions of economic disadvantage under § 8(a) and § 8(d). The 1996 regulations establish that § 8(a) certification requires, for determination of economic disadvantage, comparison with "others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.106(a) (1996). Subsection 8(d) certification, however, apparently requires comparison with "others in the same or similar line of business" generally, presumably with all others, socially disadvantaged or not. 13 C.F.R. § 124.106(b) (1996). Because under 1996 programs based on § 8(d) economic disadvantage is

to be presumed for minorities, the § 8(d) comparative analysis would appear to arise only in the event of either a challenge to the presumption in the case of a particular minority DBE, or application for DBE status by a socially-disadvantaged non-minority subcontractor (the classic example being the white subcontractor from rural Appalachia). We are unable to discern the constitutional relevance of these two slightly different methods of comparison.[27] Moreover, the distinction between the two has disappeared in the current version of the regulations. The current regulation retains the more precise definition previously applicable to the § 8(a) program, requiring a comparison of the applicant to those who are not socially disadvantaged. *See* 13 C.F.R. § 124.104(a) (2000); *see also* 48 C.F.R. § 19.001 (2000) (incorporating the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A, in determining social and economic disadvantage).

IV

As a final matter, the government argues that we should remand this case in light of a pending, potentially related lawsuit originally filed under the name *Adarand Constructors, Inc. v. Romer*, No. CIV. A. 97-K-1351 (D.

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[27] We reject the contention that two slightly different definitions of economic disadvantage for purposes of two different certification methods create uncertainty as to who is a DBE, thus necessarily precluding any finding of narrow tailoring.

Colo.) (filed June 26, 1997).[28] *Romer* involves a challenge by plaintiff in the instant case to use of race-conscious policies in highway construction projects by CDOT. Adarand has conceded that its challenge in the instant case is to "the federal program, implemented by federal officials," and not to the letting of federally-funded construction contracts by state agencies. (Appellee's Br. at 24 n.23.) We do not have before us a sufficient record to enable us to evaluate the separate question of CDOT's implementation of race-conscious policies. The propriety of potential consolidation of the instant action and *Romer* following our remand is a question to be considered by the district court in the first instance, should that question arise.

V

The judgment of the district court is *REVERSED*. This matter is remanded for further proceedings consistent with this opinion.

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[28] Decisions arising out of the *Romer* litigation include: *Adarand Constructors, Inc. v. Romer*, 174 F.R.D. 100 (D. Colo. 1997) (denying the federal government's motion to intervene); *Adarand Constructors, Inc. v. Romer*, No. 97-1285, 1999 WL 770176 (10th Cir. Sept. 29, 1999) (unpublished) (permitting intervention by the federal government); and *Adarand Constructors, Inc. v. Owens*, No. CIV. A. 97-K-1351, 2000 WL 490690 (D. Colo. Apr. 24, 2000) (unpublished) (dismissing the governor of Colorado as a defendant).

APPENDIX

As noted, several statutes are implicated in this case, notably the Small Business Act of 1958 ("SBA"), Pub. L. No. 85-536, 72 Stat. 384, as amended, 15 U.S.C. §§ 631 *et seq.*, § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132, and § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub. L. No. 102-240, 105 Stat. 1914, the Transportation Equity Act for the 21st Century of 1998 ("TEA 21"), Pub. L. No. 105-178, 112 Stat. 107, 113, as well as their accompanying administrative regulations. In the discussion that follows, we outline the statutory and regulatory scheme as it was at the time of the first and second district court decisions.[29] Then we discuss the relevant changes in that scheme after 1997.

A. SBA

Subsection 8(d)(1) of the SBA states "[i]t is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1).[30] "Socially disadvantaged

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[29] The relevant language in the statutes and regulations did not change in any material way between *Adarand I* and *Adarand IV*, and therefore references to regulations are to 1991 regulations unless otherwise indicated.

[30] The SCC defines Disadvantaged Business Enterprises ("DBEs") as those concerns owned and operated by socially and economically disadvantaged individuals.

individuals" are defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). The SBA further defines "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A).[31]

15 U.S.C. § 637(d)(2) requires that all federal contracts, with certain exceptions not relevant here, contain a clause stating it is the government's policy for small disadvantaged businesses to have "the maximum practicable opportunity to participate" as contractors or subcontractors. *See* 15 U.S.C. § 637(d)(3). The required clause includes the following language: "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section

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[31] It appears that the 1996 regulations implementing the § 8(d) certification program provide that the showing of disadvantage requires a general comparison "to others in the same or similar line of business." 13 C.F.R. § 124.106(b)(1) (1996). Justice O'Connor suggests that this distinction may have constitutional significance. See *Adarand III*, 515 U.S. at 238.

8(a) of the Small Business Act [15 U.S.C. 637(a)]." 15 U.S.C. § 637(d)(3)(C).[32]

15 U.S.C. § 644(g)(1) provides for a government-wide goal of 5% minimum minority business participation calculated on the basis of "the total value of all prime contract and subcontract awards for each fiscal year."[33]

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[32] 15 U.S.C. § 637(d)(4) provides for certain additional requirements for contracts to be awarded "pursuant to the negotiated method of procurement" and exceeding certain dollar amounts. These requirements include an approved plan providing maximum opportunity for small business concerns, *see id.* § 637(d)(4)(D), and provision for agencies to offer incentives to encourage subcontracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals, *see id.* § 637(d)(4)(E). The parties have not addressed paragraph (4) of § 8(d) at all, and, because there is no indication from the parties that Adarand has or will bid for contracts governed by that paragraph's requirement, we do not address it in great detail.

[33] Section 644(g)(1) provides in relevant part that

> [t]he President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. . . . The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. . . . Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity . . . for small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

The Federal Highway Administration appears to have adopted, pursuant to 15 U.S.C. § 644(g)(2), goals of 12-15% participation for the period of time pertinent to this litigation. (Appellants' App. at 187.) These goals are aspirational rather than mandatory and must "realistically reflect the potential" of small disadvantaged businesses to perform subcontracts. *See* 15 U.S.C. § 644(g)(2), (h)(1). Section 644(h) further mandates annual reports to the Administration and Congress on the results of government agency efforts to increase contracting participation by small businesses, including those owned and controlled by socially and economically disadvantaged individuals.

1. Subsection 8(a)

The § 8(a) program provides numerous benefits to disadvantaged businesses aside from eligibility for the SCC program.[34] Eligibility requires "small" size and 51% ownership by individuals socially and economically disadvantaged. *See* 13 C.F.R. § 124.103. Subsection 8(a) regulations incorporate a presumption that enumerated minorities are socially disadvantaged, *see* 13 C.F.R. § 124.105(b)(1), and others can prove social disadvantage by clear and convincing evidence, *see id.* § 124.105(c). The presumption of disadvantage is in theory rebuttable by a third party. *See* 49 C.F.R. § 23.69. All businesses must

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[34] Although Adarand lacks standing to challenge the constitutionality of the § 8(a) program per se, we consider its provisions insofar as they are relevant to the use of racially-conscious presumptions in determining certification of DBEs for the SCC program challenged here.

separately prove economic disadvantage. *See id.* § 124.106(a). Eligibility for the § 8(a) program confers an automatic presumption of disadvantage under § 8(d). *See* 15 U.S.C. § 637(d)(3)(C).

2. Subsection 8(d)

The relevant portions of § 8(d) in themselves require only the inclusion of a provision in federal contracts stating the government's policy of maximizing contracting opportunities for small businesses, including those owned and controlled by socially and economically disadvantaged individuals. *See* 15 U.S.C. § 637(d)(1)-(3).[35] Subsection (d) is relevant to this litigation, however, insofar as the definition set forth therein serves as a basis for certifying small businesses as disadvantaged for purposes of compensating prime contractors under the SCC. *See* 49 C.F.R. § 23.53.[36] Like § 8(a), § 8(d) includes

[35] There is no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit or that Adarand has and will continue to bid for contracts or subcontracts covered by those paragraphs. *See* 15 U.S.C. § 637(d)(4)-(6).

[36] The relevant state DBE program at the time of the contract at issue, under which Adarand's competitor was certified as a DBE, provided that "persons who are members of [specified racial/ethnic minorities] are 'rebuttably presumed' to be socially and economically disadvantaged." (Appellants' App. at 131.) Pursuant to *Adarand VI*, because Colorado's revised program may be inconsistent with federal requirements, we direct our inquiry to the possibility of reinstatement of the prior state DBE certification requirements, as informed by federal law and regulation.

language instructing contractors to afford a presumption of social disadvantage based on race. *See id.* The Court stated that certain regulations based on § 8(d) "appear[ ] to require an individualized, although 'less restrictive,' showing of economic disadvantage." *Adarand III*, 515 U.S. at 207 (quoting 13 C.F.R. § 124.106(b)). However, other regulations provide for presumptions of both social and economic disadvantage. *See Adarand III*, 515 U.S. at 207-08 (citing 48 C.F.R. §§ 19.011, 19.703(a)(2)). The Court was thus "left with some uncertainty as to whether participation in the [§] 8(d) subcontracting program requires an individualized showing of economic disadvantage." *Adarand III*, 515 U.S. at 208.[37] Both presumptions of disadvantage are theoretically rebuttable by a third party. (*See* Appellants' App. at 131.)

B. STURAA and ISTEA provisions

STURAA and ISTEA are relevant insofar as they incorporate the presumption of disadvantage from SBA § 8(d). *See* STURAA § 106(c)(2)(B), ISTEA § 1003(b)(2)(B) (providing that the term "socially and economically disadvantaged individual" has the meaning of such term under SBA § 8(d) "and relevant subcontracting regulations promulgated pursuant thereto."). Both measures set

[37] As noted, those portions of § 8(d) at issue here perhaps may be more properly characterized as a requirement that a clause be included in contracts than as a discrete program. However, the Supreme Court has characterized the requirements as a discrete program, and we note that they are certainly relevant to the SCC program at issue because they inform the criteria for certification of DBE participants by state agencies.

forth aspirational goals of 10% DBE participation in federal subcontracting. *See* ISTEA § 1003(b)(1).

C. Subcontracting Compensation Clause

The particular means of implementation of the various statutory goals and directives at issue in this litigation is the SCC. This clause provides a financial bonus of up to 10% of an approved subcontract (no more than 1.5% or 2% of the original contract, depending on how many DBEs are employed) to a prime contractor in return for employing a DBE. (*See* Appellants' App. at 55-56.)[38]

[38] The Supreme Court in *Adarand III* stated that "[f]ederal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that '[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.' " 515 U.S. at 205 (quoting 15 U.S.C. §§ 637(d)(2), (3)). However, examination of the statute reveals that 15 U.S.C. § 637, while providing for inclusion in most federal agency contracts of a clause stating that "[i]t is the policy of the United States that . . . small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency," 15 U.S.C. § 637(d)(3)(A), the relevant provisions of § 8(d) do not require the particular contract provision at issue here: "[m]onetary compensation . . . for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals," *Adarand III*, 515 U.S. at 209 (citation omitted). *Cf.* 15 U.S.C. § 637(d)(4)(E). Rather, that clause, the SCC, was established administratively by the

Subcontractors must be certified as DBEs by "the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer" pursuant to the "[§] 8(a) or [§] 8(d) program, or certification by a State under the DOT regulations." *Adarand III*, 515 U.S. at 209-10.

D. Post-1996 Changes

1. SBA

There have been no significant changes to § 637(a) or (d) relevant to the Adarand litigation after 1996. Virtually the only changes to these statutory sections were additions of language including other groups in the SBA's affirmative action program: 1995 (women); 1998 ("HUBZone small business concerns"); and 2000 (veterans). Likewise, the key language in § 644(g)(1) – "The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established

Federal Lands Highway Program ("FLHP") of the Department of Transportation ("DOT") pursuant to the FLHP's obligations under 15 U.S.C. § 644(g). (*See* Appellants' App. at 33.) In *Adarand II*, 16 F.3d at 1545-56, ("*Adarand II*"), we concluded that the FLHP was acting within its delegated power under § 644(g) in promulgating the SCC. The Supreme Court, in altering the equal protection standard of scrutiny applicable to federal action in *Adarand III*, did not disturb this statutory conclusion. Therefore it remains law of the case that the SCC constitutes an exercise of the FLHP's delegated authority under § 644(g), and we discern no clear error in that prior decision or manifest injustice sufficient to warrant overriding the law of the case doctrine. *See Agostini*, 521 U.S. at 236; *McIlravy*, 204 F.3d at 1034-35.

at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year" – has not changed. However, § 644(g)(1) has been amended at various times during the litigation to include government-wide contracting goals for other groups, such as women, service-disabled veterans, and HUBZone small business concerns.

Of the regulations implementing § 8(a) of the SBA, 13 C.F.R. §§ 124.1 *et seq.*,[39] two regulations – those defining social and economic disadvantage – are relevant to this litigation and differ significantly from their 1996 counterparts. The most extensive changes were made in 1998 and are present in the current regulations.

The regulation defining social disadvantage are presently located at 13 C.F.R. § 124.103, and its language, preceding the list of presumptively socially disadvantaged groups, has changed. The current regulation states: "There is a rebuttable presumption that the following individuals are socially disadvantaged. . . . " 13 C.F.R. § 124.103(b)(1) (2000); *see also id.* § 124.103(b)(3) ("The presumption of social disadvantage may be overcome with credible evidence to the contrary."). This change reemphasizes that the presumption of social disadvantage based on group membership is not absolute.

In addition, the burden on members of unlisted groups to show they are socially disadvantaged has been

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[39] The § 8(d) program regulations are located at 48 C.F.R. pt. 19, but they specifically incorporate the definitions of "small disadvantaged business concern" contained in 13 C.F.R. pt. 124, subpt. B. *See* 48 C.F.R. § 19.001 (2000); 13 C.F.R. § 124.1002(a) (2000) (incorporating 13 C.F.R. pt. 124, subpt. A).

reduced. Currently, social disadvantage may be established by a "preponderance of the evidence," rather than by the former "clear and convincing" evidentiary standard. *Compare* 13 C.F.R. § 124.103(c)(1) (2000) *with* 13 C.F.R. § 124.105(c)(1) (1997). The Small Business Administration explains that this change was meant to more narrowly tailor the § 8(a) program in light of *Adarand III*. *See 8(a) Business Development/Small Disadvantaged Business Status Determinations*, 63 Fed. Reg. 35,726, 35,728 (1998) ("In response to the Supreme Court's decision in *Adarand [III]* . . . , the Department of Justice recommended the 'preponderance of the evidence' standard for government-wide disadvantaged business programs. [The Small Business Administration] . . . continues to believe that the use of this standard strengthens the defense of the [§] 8(a) B[usiness] D[evelopment] program.").

The relevant regulations regarding economic disadvantage are presently located at 13 C.F.R. § 124.104. The *Adarand III* majority expressed concern about the "apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the [§] 8(a) and [§] 8(d) programs." *Adarand III*, 515 U.S. at 238-39. The new regulations rectify that discrepancy, retaining the more precise definition previously applicable to the § 8(a) program, which requires comparing the applicant to those who are not socially disadvantaged. *See* 13 C.F.R. § 124.104(a) (2000). The current regulations also impose a new requirement on applicants: They must submit a narrative statement describing their economic disadvantage. *See id.* § 124.104(b)(1) (2000).

As to duration of DBE certification, the current § 8(d) certification program regulations provide for certification of a business as socially disadvantaged for three years after either the initial certification or other administrative determination. *See* 13 C.F.R. § 124.1014 (2000). If a DBE wishes to retain its certification for longer than three years, it must "submit a new application and receive a new certification." *Id.* § 124.1014(c).

2. STURAA, ISTEA, and TEA-21

The language in STURAA, ISTEA, and TEA-21 concerning the DBE program is similar. Notably, the requirement that "not less than 10 percent of the amounts" authorized under those Acts "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals" remains unchanged in all three statutes. TEA-21 § 1101(b)(1), 112 Stat. at 113; ISTEA § 1003(b)(1), 105 Stat. 1919; STURAA § 106(c)(1), 101 Stat. 132.

The only significant change in the transportation appropriations statutes is the addition in both § 1003(b) of ISTEA, 105 Stat.1920-22, and § 1101(b)(6) of TEA-21, 112 Stat. 114-15, of a requirement that the Comptroller General conduct a study and report to Congress regarding several aspects of the DBE program.

In ISTEA § 1003(b)(5), 105 Stat. 1920-22, the Comptroller General is given twelve months to study and prepare a report discussing: graduation from the program; the extent of out-of-state contracting with disadvantaged businesses by prime contractors; whether adjustments

could be made "with respect to Federal and State participation in training programs and with respect to meeting capital needs and bonding requirements" to increase the success of disadvantaged business enterprises; possible "revisions and additions to criteria used to determine the performance and financial capabilities of" DBEs; the costs and benefits of meeting the goal of 10% participation by DBEs; the effect of the program on the construction industry; the certification process; and the implementation of the program by states.

In TEA-21 § 1101(b)(6), 112 Stat. 114-15, the Comptroller General is given three years to study and prepare a report discussing: the number, participation in prime contracts and subcontracts, gross receipts, and net worth of DBEs; the overall costs of the DBE program, "including administrative costs, certification costs, additional construction costs, and litigation costs"; discrimination against DBEs in various markets including transportation contracting, financial, insurance, credit and bonding; the costs of any court order striking down the DBE program; and the impact of the program on competition and the creation of jobs.

The regulations implementing affirmative action programs of STURAA, ISTEA, and TEA-21 have undergone the most change of any of the relevant regulations at issue over the course of the instant litigation. According to the federal Department of Transportation, the changes were made "primarily in response to the 'narrow tailoring' requirements of *Adarand [III],*" and the final rule "complies with the requirements that the courts have established for a narrowly tailored affirmative action program." *Participation by Disadvantaged Business Enterprises*

in Department of Transportation Programs, 64 Fed. Reg. 5096 (1999); *see also id.* at 5101-03 (discussing the requirements of narrow tailoring and the ways in which the new regulations attempt to meet those requirements). The current regulations, which apply to any federal highway funds authorized under ISTEA or TEA-21, *see* 49 C.F.R. § 26.3(a) (2000), are located at 49 C.F.R. pt. 26.

The current regulations specify that the presumption of economic disadvantage automatically is rebutted for any individual whose net worth is above $750,000, without a requirement of further proceedings. *See id.* § 26.67(b)(1) (2000). This conforms with SBA regulations concerning re-certification of economic disadvantage. *See* 13 C.F.R. § 124.104 (2000). The current regulations also retain the requirement that businesses not exceed a certain amount of gross receipts in order to be eligible for the DBE program. *See* 49 C.F.R. § 26.65(b) (2000).

Regarding the allocation of subcontracts to DBEs, the current regulations explicitly prohibit the use of quotas. *See id.* § 26.43(a). Similarly, the current regulations prohibit use of set-asides except in "limited and extreme circumstances . . . when no other method could be reasonably expected to redress egregious instances of discrimination." *Id.* § 26.43(b). Although acknowledging that ISTEA and TEA-21 set a goal of 10% DBE participation in government contracts, the current regulations term this "an aspirational goal at the national level," *id.* § 26.41(b), which "does not authorize or require recipients to set

overall or contract goals at the 10 percent level, or any other particular level," *id.* § 26.41(c).[40]

Extensive regulatory requirements must be met before goals may be set for DBE participation in a particular market. *See id.* § 26.45. Goals must be based on "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate" and must make "reference to the relative availability of DBEs in [the recipient's local] market." *Id.* § 26.45(b). In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." *Id.* § 26.45(c). Such evidence may include census data and valid disparity studies. *See id.* § 26.45(c)(1)-(3). After examining this evidence, the recipient must adjust its DBE participation goals by examining the capacity of DBEs to perform needed work, disparity studies, and other evidence. *See id.* § 26.45(d). When submitting these goals, the recipient must include a description of the methodology and evidence used in setting them. *See id.* § 26.45(f)(3). Finally, there is no requirement that the recipient actually meet its goals, merely that it make a good faith effort to do so; failure to meet goals will not subject a recipient to penalties or to being held in noncompliance as long as good faith efforts were made. *See id.* § 26.47(a).

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[40] The term "recipient" is defined by the regulations as "any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the . . . FHWA." 46 C.F.R. § 26.5 (2000). The FLHP is such a program and therefore is a "recipient" for purposes of the relevant regulations. *See* 23 C.F.R. § 645.105(f) (2000).

Wherever possible, the current regulations require recipients to use race-neutral means to "meet the maximum feasible portion" of their overall DBE participation goals. *Id.* § 26.51(a); *see also id.* § 26.51(f) (if a recipient can meet its overall goals through race-neutral means, it must implement its program without the use of contract goals). The current regulations also outline several race-neutral means available to program recipients including helping overcome bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See id.* § 26.51(b).

For those not falling into one of the categories to which a presumption of social disadvantage applies, the current regulations retain procedures for non-minorities to participate in the DBE program. Consistent with the changes in SBA regulations, proof of social and economic disadvantage by those not so presumed may be shown by a preponderance of the evidence. *See id.* §§ 26.61(d), 26.67(d). Additionally, the current regulations require recipients to make sure DBEs are not "so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate." *Id.* § 26.33(a).

Finally, as to any part of the foregoing DBE statutory and regulatory framework, the current regulations allow recipients to seek waivers and exemptions, despite the already non-mandatory nature of the DBE programs. *See id.* § 26.15. In this way, the statutory and regulatory scheme provides yet another means of ensuring that the program is not applied more broadly than warranted.

3. SCC

The government maintains, and Adarand does not dispute, that the SCC, which spawned this litigation in 1989, is no longer in use. (*See* Appellants' Supp. Br. Attach. 1 (memorandum from Arthur E. Hamilton, Federal Lands Program Manager to Federal Lands Highway Division Engineers stating that "[t]he SCC will not be placed in any future invitations for bids" and "shall be removed by amendment from any invitations for bids where the bid opening has not taken place").)

In November 1997, before the discontinuation of its use, the SCC was revised by the addition of a new section[41] which creates further conditions of eligibility for the program. (*See id.* Attach. 2 (new section of the SCC).) To begin with, subject to modification based on DBE availability, at least 10% of the prime contract must go to DBEs for SCC eligibility. If a DBE subcontractor is hired, that DBE may only contract out to non-DBEs "for onsite work . . . incidental to, and necessary for the accomplishment of," the subcontract, in an amount not to exceed 50 percent of the value of the DBE's subcontract. (*Id.* at 2.) In addition to the 1.5-2% cap on the total amount of the prime contract that may be awarded pursuant to the SCC,

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[41] It is unclear from the record whether the 1997 revision to the SCC entailed the addition of a new section or the replacement of the previous one. The revision instructs those using the SCC to "[a]dd the following [revision]," (Appellants' Supp. Br. Attach. 2 at 1), rather than replace the existing SCC, and we thus assume the 1997 revision is an addition to the SCC. However, in either case, our analysis in this opinion remains the same.

the new section adds a further cap of $50,000 if subcontracting to one DBE and $100,000 if subcontracting to more than one DBE.

The revised SCC retains the provision furnishing prime contractors with "[c]ompensation . . . to locate train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field," but adds the explanation that this compensation is provided "to offset costs and anticipated risks associated with awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals (DBE)." (*Id.* at 1.)

Finally, the new section provides an alternative route to certification, "ad hoc certification" based on "self certification" accompanied by the requisite documents to demonstrate qualification for the program, as well as "documentation showing the disposition of any previous application for certification the subcontractor has made to any Federal, State or local Government agency." (*Id.*) If a would-be self-certified DBE has already been rejected by a government agency, ad hoc certification will not be granted "unless the reasons for [the previous] denial have been resolved." (*Id.*)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff – Appellee,

v.

FEDERICO PENA, Secretary of the Department of Transportation; RODNEY E. SLATER, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants – Appellants,

No. 97-1304

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

ORDER

Filed April 5, 2000

Before **LUCERO, McKAY,** and **MURPHY,** Circuit Judges.

The following order is entered nunc pro tunc to April 3, 2000 to include the case number for this appeal.

A petition for rehearing en banc was received by the court on March 14, 2000; however, a petition for rehearing en banc is improper under 10th Cir. R. 35.7. Therefore, the document is construed as a petition for panel rehearing and is denied.

Additionally, counsel for the appellee is reminded that if they wish to respond to the government's supplemental brief that the deadline is April 4, 2000.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Audrey F. Weigel
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff – Appellee,

v.

RODNEY E. SLATER, Secretary of the Department of Transportation; KENNETH R. WYKLE Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,

Defendants – Appellants.

No. 97-1304

PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,

Amici Curiae.

ORDER

Filed February 18, 2000

Before **LUCERO, McKAY** and **MURPHY,** Circuit Judges.

This matter comes on for consideration of the judgment of the Supreme Court of the United States reversing the judgment of this court entered March 4, 1999, and remanding the cause to this court for further proceedings.

Upon consideration whereof, it is the order of this court as follows:

1. The mandate issued to the United States district Court for the District of Colorado on May 27, 1999, is recalled.

2. The judgment of this court filed March 4, 1999, is vacated.

Counsel will be notified if this court desires further briefing prior to disposition of this appeal upon remand.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Kathleen M. Fabrizio
Deputy Clerk

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

v.

Rodney SLATER, Secretary of Transportaiton, et al.

No. 99-295.2
Decided Jan. 12, 2000.

PER CURIAM.

I

Congress has adopted a policy that favors contracting with small businesses owned and controlled by the socially and economically disadvantaged. See § 8(d)(1) of the Small Business Act, as added by § 7 of Pub. L. 87-305, 75 Stat. 667, and as amended, 15 U.S.C. § 637(d)(1) (1994 ed., Supp. IV). To effectuate that policy, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, § 1003(b), 105 Stat. 1919, which is an appropriations measure for the Department of Transportation (DOT), seeks to direct 10 percent of the contracting funds expended on projects funded in whole or in part by the appropriated funds to transportation projects employing so-called disadvantaged business enterprises.[1] ISTEA, § 1003(b)(1).

[1] Congress recently enacted the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, Tit. I, § 1101(b), 112 Stat. 113, the successor appropriations measure to ISTEA. Although the new Act contains similar provisions, it is technically the provisions of ISTEA that apply to funding obligated in prior fiscal years but not yet expended.

To qualify for that status, the small business must be certified as owned and controlled by socially and economically disadvantaged individuals. DOT does not itself conduct certifications, but relies on certifications from two main sources: the Small Business Administration, which certifies businesses for all types of federal procurement programs, and state highway agencies, which certify them for purposes of federally assisted highway projects. The federal regulations governing these certification programs, see 13 CFR pt. 124 (1999) (Small Business Administration); 64 Fed. Reg. 5096-5148 (1999) (to be codified in 49 CFR pt. 26) (DOT for state highway agencies), require that the certifying entity *presume* to be socially disadvantaged persons who are black, Hispanic, Asian Pacific, Subcontinent Asian, Native Americans, or members of other groups designated from time to time by the Small Business Administration. See 13 CFR § 124.103(b); 64 Fed. Reg. 5136 (§ 26.67). State highway agencies must in addition presume that women are socially disadvantaged. *Id.*, at 5136 (§ 26.67). Small businesses owned and controlled by persons who are not members of the preferred groups may also be certified, but only if they can *demonstrate* social disadvantage. See 13 CFR § 124.103(c); 64 Fed. Reg. 5136-5137 (§ 26.67(d)); *id.*, at 5147-5148 (pt. 26, subpt. D, App.E). Third parties, as well as DOT, may challenge findings of social disadvantage. See 13 CFR § 124.1017(a); 64 Fed. Reg. 5142 (§ 26.87).

II

In 1989, DOT awarded the prime contract for a federal highway project in Colorado to Mountain Gravel &

Construction Company. The contract included a Subcontractor Compensation Clause – which the Small Business Act requires all federal agencies to include in their prime contracts, see 15 U.S.C. § 637(d) – rewarding the prime contractor for subcontracting with disadvantaged business enterprises, see § 637(d)(4)(E). Petitioner, whose principal is a white man, submitted the low bid on a portion of the project, but Mountain Gravel awarded the subcontract to a company that had previously been certified by the Colorado Department of Transportation (CDOT) as a disadvantaged business enterprise.

Petitioner brought suit against various federal officials, alleging that the Subcontractor Compensation Clause, and in particular the race-based presumption that forms its foundation, violated petitioner's Fifth Amendment right to equal protection. The Tenth Circuit, applying the so-called intermediate scrutiny approved in some of our cases involving classifications on a basis other than race, see *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), upheld the use of the clause and the presumption. *Adarand Constructors, Inc. v. Pea*, 16 F.3d 1537 (1994). Because DOT's use of race-based measures should have been subjected to strict scrutiny, we reversed and remanded for the application of that standard. *Adarand Constructors, Inc. v. Pea*, 515 U.S. 200, 237-239, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*Adarand I*).

On remand, the District Court for the District of Colorado held that the clause and the presumption failed strict scrutiny because they were not narrowly tailored. *Adarand Constructors, Inc. v. Pea*, 965 F.Supp. 1556 (1997)

(*Adarand II*). Specifically, the court held the presumption that members of the enumerated racial groups are socially disadvantaged to be both overinclusive and underinclusive, because it includes members of those groups who are not disadvantaged and excludes members of other groups who are. *Id.*, at 1580. The District Court enjoined DOT from using the clause and its presumption.[2] *Id.*, at 1584. Respondents appealed to the Tenth Circuit.

Shortly thereafter, and while respondents' appeal was still pending, petitioner filed a second suit in the District Court this time naming as defendants certain Colorado officials, and challenging (on the same grounds) the State's use of the federal guidelines in certifying disadvantaged business enterprises for federally assisted projects. *Adarand Constructors, Inc. v. Romer*, Civ. No. 97-K-1351 (June 26, 1997). Shortly after this suit was filed, however, Colorado altered its certification program in response to the District Court's decision in *Adarand II*. Specifically, the State did away with the presumption of social disadvantage for certain minorities and women, App. to Pet. for Cert. 109-111, and in its place substituted a requirement that all applicants certify on their own account that each of the firm's majority owners "has experienced social disadvantage based upon the effects of racial, ethnic or gender discrimination," *id.*, at 110.

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[2] Before the Tenth Circuit, the parties disagreed as to whether the scope of the District Court's remedial order was appropriate. In characterizing that order as we do here, we do not intend to take a position in that dispute.

Colorado requires no further showing of social disadvantage by any applicant.

A few days after Colorado amended its certification procedure, the District Court held a hearing on petitioner's motion for a preliminary injunction in *Romer*. The District Court took judicial notice of its holding in *Adarand II* that the Federal Government had discriminated against petitioner's owner "by the application of unconstitutional rules and regulations." *Id.*, at 136. As a result of that race-based discrimination, the District Court reasoned, petitioner likely was eligible for disadvantaged-business status under Colorado's system for certifying businesses for federally assisted projects – the system at issue in *Romer*. *Id.*, at 137. The District Court therefore denied petitioner's request for a preliminary injunction. *Id.*, at 138. Petitioner then requested and received disadvantaged-business status from CDOT.

Meanwhile, respondents' appeal from the District Court's decision in *Adarand II* was pending before the Tenth Circuit. Upon learning that CDOT had given petitioner disadvantaged-business status, the Tenth Circuit held that the cause of action was moot, and vacated the District Court's judgment favorable to petitioner in *Adarand II*. 169 F.3d 1292, 1296-1297, 1299 (C.A.10 1999). Petitioner filed a petition for certiorari.

III

In dismissing the case as moot, the Tenth Circuit relied on the language of the Subcontractor Compensation Clause, which provides that "[a] small business concern will be considered a [disadvantaged business

enterprise] after it has been certified as such by . . . any State's Department of Highways/Transportation." *Id.*, at 1296. Because CDOT had certified petitioner as a disadvantaged business enterprise, the court reasoned, the language of the clause indicated that the Federal Government also had accepted petitioner's certification for purposes of federal projects. As a result, petitioner could no longer demonstrate " 'an invasion of a legally protected interest' that is sufficiently 'concrete and particularized' and 'actual or imminent' " to establish standing. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Because, the court continued, petitioner could not demonstrate such an invasion, its cause of action was *moot*. 169 F.3d, at 1296-1297.

In so holding, the Tenth Circuit "confused mootness with standing," *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, ___ U.S. ___, ___, 120 S.Ct. 693, 709, 145 L.Ed. 2d 610 (2000), and as a result placed the burden of proof on the wrong party. If this case is moot, it is because the Federal Government has accepted CDOT's certification of petitioner as a disadvantaged business enterprise, and has thereby ceased its offending conduct. Voluntary cessation of challenged conduct moots a case, however, only if it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) (emphasis added). And the " 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the*

party asserting mootness." *Friends of Earth, ante*, at 709 (emphasis added) (quoting *Concentrated Phosphate Export Assn., supra*, at 203, 89 S.Ct. 361).

Because respondents cannot satisfy this burden, the Tenth Circuit's error was a crucial one. As common sense would suggest, and as the Tenth Circuit itself recognized, DOT accepts only "valid certification[s]" from state agencies. 169 F.3d, at 1298. As respondents concede, however, see Brief in Opposition 13-14, n. 6, DOT has yet to approve-as it must-CDOT's procedure for certifying disadvantaged business enterprises, see 64 Fed. Reg. 5129 (1999) (49 CFR § 26.21(b)(1)) ("[The State] must submit a [disadvantaged business enterprise] program conforming to this part by August 31, 1999 to the concerned operating administration").

DOT has promulgated regulations outlining the procedure state highway agencies must follow in certifying firms as disadvantaged business enterprises. See *id.*, at 5096-5148 (pt. 26). As described earlier, those regulations require the agency to presume that "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the [Small Business Administration]," are socially disadvantaged. *Id.*, at 5136 (§ 26.67(a)(1)). Before individuals not members of those groups may be certified, the state agency must make individual determinations as to disadvantage. See *id.*, at 5136-5137 (§ 26.67(d)) ("In such a proceeding, the applicant firm has the burden of demonstrating to [the state highway agency], by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged"); *Id.*, at

5147-5148 (pt. 26, subpt. D, App. E) (providing list of "elements" that highway agencies must consider in making individualized determinations of social disadvantage). CDOT's new procedure under which petitioner was certified applies no presumption in favor of minority groups, and accepts without investigation a firm's self-certification of entitlement to disadvantaged-business status. See App. to Pet. for Cert. 109-111. Given the material differences (not to say incompatibility) between that procedure and the requirements of the DOT regulations, it is not at all clear that CDOT's certification is a "valid certification," and hence not at all clear that the Subcontractor Compensation Clause requires its acceptance.

Before the Tenth Circuit, respondents took pains to "expres[s] no opinion regarding the correctness of Colorado's determination that [petitioner] is entitled to [disadvantaged-business] status." Motion by the Federal Appellants to Dismiss Appeal as Moot and to Vacate the District Court Judgment in No. 97-1304, p. 3, n. 2. Instead, they stated flatly that "in the event there is a third-party challenge to [petitioner's] certification as a [disadvantaged business enterprise] and the decision on the challenge is appealed to DOT, DOT may review the decision to determine whether the certification was proper." *Id.*, at 3-4, n. 2. In addition, DOT itself has the power to require States to initiate proceedings to withdraw a firm's disadvantaged status if there is "reasonable cause to believe" that the firm "does not meet the eligibility criteria" set forth in the federal regulations. 64 Fed. Reg. 5142 (§ 26.87(c)(1)). Given the patent incompatibility of the certification with the federal regulations, it is far from clear that these possibilities will not become reality.

Indeed, challenges to petitioner's disadvantaged-business status seem quite probable now that the Tenth Circuit, by vacating *Adarand II*, has eliminated the sole basis for petitioner's certification in the first place.

The Tenth Circuit dismissed these possibilities as insufficiently particular and concrete to grant standing and therefore "too conjectural and speculative to avoid a finding of mootness." 169 F.3d, at 1298 (internal quotation marks omitted). As we recently noted in *Friends of the Earth*, however, "[t]he plain lesson of [our precedents] is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Ante*, at 709. Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *ante*, at 708, petitioner's cause of action remains alive.

* * *

It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought. Because that is not the case here, the petition for writ of certiorari is granted, the judgment of the United States Court of Appeals for the Tenth Circuit is reversed, and the case is

remanded for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation,	)	
Plaintiff-Appellee,	)	
v.	)	
FEDERICO PENA, Secretary of the Department of Transportation; RODNEY E. SLATER, Administrator of the Federal Highway Administration; VINCENT F. SCHIMMOLLER, Administrator of Region VIII of the Federal Highway Administration; LARRY C. SMITH, Engineer of the Central Federal Lands Highway Division,	)	No. 97-1304
Defendants-Appellents,	)	
PACIFIC LEGAL FOUNDATION; ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.; EMPLOYMENT LAW CENTER; MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC.,	)	
Amici Curiae.	)	

ORDER

(Filed May 19, 1999)

Before **LUCERO, McKAY, and MURPHY**, Circuit Judges.

Appellee's petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

ADARAND CONSTRUCTORS, INC., a Colorado corporation, Plaintiff-Appellee,

v.

Rodney E. SLATER, Secretary of the Department of Transportation; Kenneth R. Wykle, Administrator of the Federal Highway Administration; Vincent F. Schimmoller, Administrator of Region VIII of the Federal Highway Administration; Larry C. Smith, Engineer of the Central Federal Lands Highway Division, Defendants-Appellants. Pacific Legal Foundation; Employment Law Center; Minority Business Enterprise Legal Defense and Education Fund, Inc., Amici Curiae.

No. 97-1304.

United States Court of Appeals,
Tenth Circuit.

March 4, 1999.

William Perry Pendley (Todd S. Welch, with him on the brief), Mountain States Legal Foundation, Denver, Colorado, for Plaintiff-Appellee.

Robin L. Rivett, Sharon L. Browne, and Stephen R. McCutcheon, Jr., Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief.

William C. McNeill, III and Julian A. Gross for the Employment Law Center, San Francisco, California, and Franklin M. Lee and Tracie A. Watkins for the Minority Business Enterprise Legal Defense and Education Fund, Inc., Washington, D.C., filed an amicus curiae brief.

Michael E. Kennedy, General Counsel for Associated General Contractors of America, Inc., and John G. Roberts, Jr., David G. Leitch, and H. Christopher Bartolomucci of Hogan & Hartson, L.L.P., Washington, D.C., filed an amicus curiae brief for Associated General Contractors of America, Inc.

Before LUCERO, McKAY and MURPHY, Circuit Judges.

LUCERO, Circuit Judge.

This case began when plaintiff Adarand Constructors, Inc., challenged the constitutionality, under the Equal Protection Clause of the Fifth Amendment, of certain subcontractor compensation clauses (SCCs) used by the Department of Transportation to enhance government contracting opportunities for small businesses that are owned and controlled by socially and economically disadvantaged individuals. A panel of this court previously upheld these same SCCs under "intermediate scrutiny." *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir.1994) (*Adarand II*).[1] Holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny," the Supreme Court reversed, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*Adarand III*) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547, 110 S.Ct.

[1] Appellants are sued in their official capacities. The caption in this case has thus been amended to incorporate the substitution of Rodney E. Slater as Secretary of Transportation and Kenneth R. Wykle as Administrator of the Federal Highway Administration, pursuant to Fed. R.App. P. 43(c)(1).

2997, 111 L.Ed.2d 445 (1990)), and remanded the case to district court for a determination of whether the SCCs are narrowly tailored to serve a compelling governmental interest. Applying strict scrutiny, the district court granted summary judgment for plaintiffs. *See Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556 (D.Colo.1997) (*Adarand IV*).

The government now appeals, arguing that the district court incorrectly found that the subcontractor compensation clause (SCC) program was not sufficiently narrowly tailored to a compelling governmental interest as to survive strict scrutiny. Additionally, the government argues that the district court erred in ruling the use of the SCC program to be unconstitutional not only in the direct federal contracting program administered by the Department of Transportation, but also in federal aid programs operated by the State of Colorado with federal financial assistance. However, as we find this case has become moot, we do not resolve those issues, but rather remand and direct the district court to vacate its judgment below, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950).

I

The facts of this case and the program at issue have been set out in numerous judicial opinions, *see, e.g., Adarand III*, 515 U.S. at 205-10, 115 S.Ct. 2097, and we need not repeat them in detail. The essential matter relevant to our disposition is that Adarand seeks declaratory and injunctive relief against the use of SCCs that provide

additional compensation to federal government contractors employing subcontractors that qualify as Disadvantaged Business Enterprises (DBEs). The company claims that the various routes to DBE certification incorporate impermissible presumptions of social disadvantage based on race. The Supreme Court held that Adarand alleged a concrete and particularized injury sufficient to grant standing to pursue its challenge, in that the classification at issue "prevent[s] the plaintiff from competing on an equal footing." *Id.* at 211, 115 S.Ct. 2097 (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)). The Court held Adarand's injury sufficiently actual or imminent to satisfy standing requirements because Adarand had shown that it was "very likely" to bid, within a year, on another federal contract offering incentives for hiring small disadvantaged subcontractors. *Adarand III*, 515 U.S. at 211, 115 S.Ct. 2097.

Since the district court's grant of judgment in this case, however, the Colorado Department of Regulatory Agencies has certified Adarand as a DBE, which certification entitles Adarand to the benefit of the SCC under challenge. The clause at issue provides that "[a] small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or by any State's Department of Highways/Transportation." *See* Appellant's Br., Addendum 3, at 1 (Federal Lands Highway DBE/WBE Subcontract Compensation Clause) (emphasis added).

The circumstances leading to Adarand's DBE certification are as follows. After issuance of *Adarand IV*,

Adarand filed suit against state officials challenging Colorado's use of DBE guidelines in administering federally assisted highway programs. Colorado subsequently modified its DBE regulations to eliminate the presumption of social and economic disadvantage for racial and ethnic minorities, and to condition the social disadvantage branch of its DBE inquiry solely on the applicant's certification that he or she is socially disadvantaged.

Following this modification, the district court denied Adarand's motion for a preliminary injunction for lack of standing. The court apparently reasoned that as a result of the SCC program and the racial presumptions employed in awarding DBE status, Randy Pech, Adarand's principal, had been socially disadvantaged as a white male. According to the court, Adarand Constructors therefore possessed an adequate remedy at law through inclusion in the DBE program, and thus lacked standing to obtain a preliminary injunction against the state's use of the SCC in question. When Adarand applied for DBE status after the court's ruling, Pech certified that he was socially disadvantaged, and Adarand was granted the status.

II

As Adarand is now entitled to the preference it challenges, it can no longer assert a cognizable constitutional injury. "To qualify as a party with standing to litigate, a person must show, first and foremost, 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent.' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 1067, 137

L.Ed.2d 170 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). These requirements apply equally to cases on appeal. *See id.* To qualify for adjudication in the federal courts, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* at 1068 (citations omitted). Adarand seeks prospective relief invalidating the use of the SCC, and must therefore demonstrate a " 'real and immediate threat that [it] would again' suffer similar injury in the future." *Adarand III*, 515 U.S. at 211, 115 S.Ct. 2097 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)); *see also Buchwald v. University of New Mexico Sch. of Med.*, 159 F.3d 487, 493 (10th Cir.1998) (concluding that plaintiff has no standing to seek prospective injunction and declaratory relief against consideration of residency in medical school admissions without showing threat of similar injury in future). As a DBE itself, Adarand cannot make that showing, and hence the case before us is moot.

Adarand raises several arguments as to why the case should not be considered moot. First, it argues that it received DBE status only as a result of the decision below, which led the Transportation Commission of Colorado to adopt the DBE policy under which Adarand was subsequently certified. This possibility does not defeat mootness. We have previously held that a city's withdrawal of a policy struck down by a district court rendered plaintiffs's challenge to that policy moot, notwithstanding the fact that the policy had been withdrawn because it had been ruled unconstitutional. *See 19 Solid Waste Dep't Mechanics v. Albuquerque*, 76 F.3d 1142, 1143-44 (10th Cir.1996). Although the district court's comments in

denying Adarand's motion for a preliminary injunction in *Adarand Constructors, Inc. v. Romer* may have prompted Pech's application for DBE status, the dispositive fact for our standing analysis is that he now has that status. Further, Adarand faces no collateral legal consequences from the SCC program. *Cf. Sibron v. New York*, 392 U.S. 40, 57, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968).

Second, Adarand argues that this case involves actions capable of repetition yet evading review. *See Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). Adarand contends that if this case is dismissed and the judgment vacated, then the company will be decertified because its status as socially disadvantaged is contingent upon the district court's judgment that the SCC discriminates on the basis of race.[2] The Supreme Court has held that an action for prospective relief can avoid mootness under the doctrine of "capable of repetition yet evading review . . . only in the exceptional situations . . . where the following two circumstances are present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [i]s a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (citations and internal quotations omitted). Adarand fails to show that the circumstances of its challenge are too brief for complete litigation. To show a reasonable expectation that it is vulnerable to repetition of the same action

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[2] Insofar as this is also an argument against vacating the judgment below, we address it again infra Section III.

by the government, Adarand attempts to draw analogy to the situation of the plaintiff in *Rex v. Owens ex rel. State of Oklahoma*, 585 F.2d 432, 434-35 (10th Cir.1978), in which we found the involuntary commitment of a patient to a mental institution "on at least four distinct and separate occasions," *id.* at 435, to be capable of repetition yet evading review. We find no indication that Adarand has been or will be subjected to such repetitive action. Adarand's suggestion, made without factual support, that Colorado will continually revoke Adarand's DBE certification, and then reimpose it to avoid review, does not comprise a "reasonable expectation that the plaintiff will be subjected to the same action again." *Id.* Nor are we shown any evidence that the government "manipulated" both Adarand and Colorado into respectively seeking and conferring DBE status, in an effort to establish a repetitive and unreviewable pattern of certification and revocation.

Third, Adarand argues that because its DBE certification is not recognized by the federal government, it is subject to denial of the right to compete equally for federal highway subcontracts in Wyoming and New Mexico. Under the SCC, however, a small business is entitled to DBE treatment "after it has been certified as such . . . by . . . any State's Department of Highways/Transportation." Refusal of certification by other states therefore does not affect Adarand's DBE preference in Colorado – and the use of the SCC in Colorado highway construction is the only issue before us. In any event, the government concedes that the language of the SCC entitles Adarand to the federal subcontracting preference based on any valid certification, regardless of whether it is certified by

the particular state in which the highway construction occurs.

Fourth, Adarand argues that because the new Colorado DBE regulations do not comply with federal regulations and might be rejected by the Department of Transportation, Adarand cannot rely on its DBE status to secure the benefits of the federal SCC program. However, even were it true that the Colorado program is inconsistent with federal regulations, which the government contests, *see* 49 C.F.R. § 23.62 (allowing state DBE programs to certify nonminority individuals on a case-by-case basis), Adarand does not allege a sufficiently particular and concrete injury to grant it standing to challenge the program.[3] The possibility that Adarand faces future injury from the SCC if either Colorado's new program is rejected by the Department of Transportation or Adarand is otherwise decertified is "too conjectural and speculative to avoid a finding of mootness." *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir.1995) (citing *Anderson v. Green*, 513

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[3] Adarand reads great significance into a footnote in the government's brief declining to express a view on the merits of Adarand's DBE certification. We cannot, however, view the government's refusal to opine on the merits of an issue not before it as indicative of an intention to take action to revoke Adarand's DBE status. Nor has Adarand shown us that the Department of Transportation could even have authority to do so, save in the event of a third party challenge to Adarand's DBE certification followed by administrative appeal to DOT of Colorado's decision. *See* 49 C.F.R. §§ 23.55, 23.69(b)-(c) (establishing conditions for administrative appeal to DOT of state determinations of third party challenges to DBE status). This possibility is too speculative to create a live controversy.

U.S. 557, 559-60, 115 S.Ct. 1059, 130 L.Ed.2d 1050 (1995) (per curiam)).

III

We must also consider whether the circumstances under which this case became moot require us to vacate the judgment of the district court. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950). Generally, "[w]hen a civil case becomes moot pending appellate adjudication, '[t]he established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss.' " *Arizonans for Official English*, 117 S.Ct. at 1071 (quoting *Munsingwear*, 340 U.S. at 39, 71 S.Ct. 104). The rationale of this "duty" is to prevent a party from being bound by the preclusive effects of a judgment, "review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 39, 40, 71 S.Ct. 104. The Supreme Court has more recently explained that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994).

However, our duty under *Munsingwear* is not an absolute one. Vacatur is an equitable remedy exercised in the interests of fairness. *See id.* In weighing the appropriateness of vacatur, we examine "whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* (citing *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S.

466, 478, 36 S.Ct. 212, 60 L.Ed. 387 (1916)); *see also 19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (declining to grant vacatur where appellant city mooted case through voluntary withdrawal of policy at issue); *Jones*, 57 F.3d at 923 (granting vacatur when challenged regulations were mooted by intervening legislation).

Although the regulatory change and administrative decision enabling Adarand to gain DBE status were made by Colorado state agencies rather than by the federal government, Adarand argues that this case is nonetheless analogous to cases in which the party seeking vacatur voluntarily causes or plays an active role in causing the case to become moot. *See, e.g., U.S. Bancorp Mortgage Co.*, 513 U.S. at 27-28, 115 S.Ct. 386 (refusing to vacate where parties settle); *19 Solid Waste Dep't Mechanics*, 76 F.3d at 1144-45 (refusing to vacate where appellant caused mootness). The circumstances causing mootness in this case were precipitated by the actions of a third party and Adarand itself, not by the federal government, and there is no evidence that the government sought mootness in an effort "to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 27, 115 S.Ct. 386. We have found vacatur in an analogous case where "mootness . . . resulted not from any voluntary action by plaintiffs but rather from circumstances beyond plaintiffs' control and for which they were not responsible." *Jones*, 57 F.3d at 923 (vacating judgment when plaintiff's suit against members of the Colorado Public Utilities Commission mooted by Colorado legislature's recission of challenged taxicab regulations).

It is true that the third party actions leading to Adarand's receiving DBE status were apparently motivated in some part by the district court's decision at issue here. Consequently, vacatur might conceivably lead Colorado to withdraw Resolution No. TC-554 and return to the policy that Adarand originally challenged, thus depriving Adarand of its judgment below. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 27, 115 S.Ct. 386. The injustice to the appellants and to the public interest occasioned by a contrary result, however, is no less real, and significantly less speculative. Because we cannot address the government's arguments against the judgment below, absent vacatur, the federal appellants in this case will be bound by a judgment for which they have had no opportunity for appellate review. Furthermore, the federal government will be bound on a matter of great constitutional importance by an unreviewable district court decision, frustrating the public interest in resolution of such matters through prescribed channels of appellate review.

In conclusion, it would be contrary to the "equitable tradition of vacatur" formalized in *Munsingwear* to hold an appellant to the preclusive effects of an adverse judgment when deprived of the opportunity for appellate review through the actions of a third party. Our task is to "dispose[ ] of moot cases in the manner 'most consonant to justice' . . . in view of the nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 24, 115 S.Ct. 386 (citations omitted). Although the unusual circumstances of this case make that task a difficult one, we conclude the appropriate course of action in this case is to vacate and remand pursuant to *Munsingwear*. We acknowledge

that – while no longer quick – this case does implicate constitutional issues of substantial importance, and that it has suffered a long path through the federal courts. This history does not, however, relieve us of our duty under the Constitution to address only live cases or controversies.

We therefore VACATE the judgment below and REMAND with directions to dismiss.

ADARAND CONSTRUCTORS, INC., a Colorado Corporation, Plaintiff,
v.
Frederico PEÑA, Secretary of the Department of Transportation, Rodney E. Slater, Administrator of the Federal Highway Administration, Vincent F. Schimmoller, Administrator of Region VIII of the Federal Highway Administration, and Larry C. Smith, Division Engineer of the Central Federal Lands Highway Division, Defendants.

Civ A. No. 90-K-1413.

United States District Court,
D. Colorado.

June 2, 1997.

As Amended June 4, 1997.

Todd S. Welch, Mountain States Legal Foundation, Denver, CO, for plaintiff.

Marisa J. Demeo, Charles E. Leggott, Marybeth Martin, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, Washington, DC, Stephen D. Taylor, Assistant U.S. Attorney, Denver, CO, Lisa MacPhee, Edward V.A. Kussy, Federal Highway Administration, Department of Transportation, Washington, DC, for defendants.

Franklin Lee, Craig Thompson, Minority Business Enterprises, Washington, DC, William C. McNeill, Julian A. Gross, The Employment Law Center, San Francisco, CA, Robert Golten, Boulder, CO, Court Amicae.

MEMORANDUM DECISION ON REMAND

KANE, Senior District Judge.

Following remand from the United States Supreme Court and the Tenth Circuit Court of Appeals, Plaintiff Adarand Constructors, Inc., a highway construction company, seeks declaratory and permanent injunctive relief against Frederico Peña, Secretary of the Department of Transportation (DOT), Rodney E. Slater, Administrator of the Federal Highway Administration (FHA), Vincent F. Schimmoller, Administrator of Region VIII of the FHA, and Larry C. Smith, Division Engineer of the Central Federal Lands Highway Division (CFLHD).[1] Adarand asserts the race-conscious subcontracting compensation clause (SCC) program used by the CFLHD is unconstitutional, violating the due process and equal protection guarantees of the Fifth and Fourteenth Amendments, as well as the civil rights, privileges and immunities secured by the laws of the United States, and the provisions of Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Pending are the parties' cross-motions for summary judgment following remand. *See Adarand Constructors, Inc. v. Peña (Adarand III)*, 515 U.S. 200, 237, 115 S.Ct. 2097, 2118, 132 L.Ed.2d 158 (1995). In remanding the case, the Supreme Court held that all programs imposing race-based classifications must be adjudicated under the

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[1] Each Defendant is sued in an official capacity. Frederico Peña is no longer the secretary of the DOT. Rodney E. Slater currently holds that positon. Jane Garvey is now the Acting Administrator of the FHA.

"strict scrutiny" standard. *Id.* at 227, 115 S.Ct. at 2113. "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

While the Court ruled on the proper standard to be applied to the case at bar, it declined to render an opinion on the underlying merits. It opted instead to "remand the case to the lower courts for further consideration in light of the principles we have announced." *Id.* In explaining its decision to remand, the Court noted that certain "unresolved questions" involving the "complex regulatory regimes implicated by the use of subcontractor compensations clauses" needed to be addressed. It submitted to the lower courts the question of "whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 240, 115 S.Ct. at 2119.

The prudence of remanding this case to the trial court is difficult to perceive. Both parties have stipulated to the absence of any dispute of material fact (Cross Mot. Summ. J. Tr., Dec. 20, 1996 at 29-30), and the "unresolved questions" posed by Justice O'Connor in *Adarand III* concern only issues of statutory construction relating to "the details of the complex regulatory regimes" and a number of "apparent discrepanc[ies]" the Court found in the application of the statutes and regulations involved. 515 U.S. at 238-39, 115 S.Ct. at 2118.

While it is true that the decision to require strict scrutiny "alters the playing field in some important respects," *Id.*, it is equally true that the higher courts are better equipped to decide as a matter of law whether,

under the proper interpretation, the statutes involved can be described as in furtherance of a compelling interest and narrowly tailored to meet that interest. As such, concerns of judicial efficiency and the desire to resolve disputes quickly would have favored the resolution of the remaining legal issues by the higher courts.

Following the remand, the Tenth Circuit Court of Appeals entered an order stating that, its own judgment having been vacated and, upon consideration of the Supreme Court's judgment, the cause was remanded to this court for further proceedings. Again, in light of the lack of a genuine issue as to any material fact, the rationale for the circuit court's remand to this trial court eludes me.

Be that as it may, the parties have briefed the issue presented upon remand, namely, whether the Defendants' use of the SCC is constitutional. An amici curiae brief has been filed by the Minority Business Enterprise Legal Defense and Education Fund, Inc. and the Mid-Peninsula Minority Contractors Association. Oral argument was heard.

Jurisdiction exists under 28 U.S.C. § 1331 and § 1343.

I grant Adarand's motion for summary judgment, and deny that of the Defendants. I issue an injunction enjoining the Defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program. This effectively precludes the implementation of the statutes or regulations that grant presumptive eligibility for government preference in contracting on the basis of race, i.e., the use of presumptions of social and economic disadvantage in § 8(d) of the Small Business

Act, 72 Stat. 384, as amended, 15 U.S.C. § 631 *et seq.*, (SBA) and the use of percentage goals found in and promulgated pursuant to § 644(g) of the SBA, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) and the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. No. 102-240, 105 Stat.1914 (ISTEA.)[2] These enactments, either *per se*, or through their implementing regulations, allow presumptive eligibility for a "preferred status" in federal subcontracts based on race.

I. *Factual and Procedural Background*[3]

In 1989 the CFLHD, which is part of the DOT awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. When Mountain Gravel solicited bids from subcontractors for the guardrail portion of the contract, Adarand, a Colorado-based highway construction company, specializing in guardrail work, submitted the low bid. Gonzales Construction, owned and operated by Frankie Gonzales, also submitted a bid.

According to the prime contract, Mountain Gravel would receive additional compensation from the government if it hired subcontractors certified as small businesses controlled by "socially and economically

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[2] The Surface Transportation Assistance Act of 1982 (STAA) preceded both STURAA and ISTEA.

[3] I follow closely the synopsis of the Court in *Adarand III*, 515 U.S. at ___ - ___, 115 S.Ct. at 2102-04.

disadvantaged individuals." Whereas Gonzales is certified as such a business, Adarand is not. Despite Adarand's low bid, Mountain Gravel awarded the subcontract to Gonzales. An affidavit of Mountain Gravel's Chief Estimator states the company would have accepted Adarand's bid were it not for the additional payment received by hiring Gonzales.

Having lost the guardrail subcontract to Gonzales, Adarand filed a complaint seeking declaratory and permanent injunctive relief against DOT and other federal officials, claiming violation of its equal protection rights by the race-based presumptions inherent in the use of subcontracting compensation clauses.

The parties filed cross-motions for summary judgment. Judge Carrigan, now retired, granted the Defendants' motion. Relying on *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), he held the challenged federal program serves appropriate governmental objectives and was narrowly tailored to achieve the objectives of STAA and STURAA. *Adarand Constructors, Inc. v. Skinner (Adarand I)*, 790 F.Supp. 240, 243-45 (D.Colo.1992).

The Tenth Circuit Court of Appeals affirmed on grounds different from those relied on by Judge Carrigan. *Adarand Constructors, Inc. v. Pena* (*Adarand II*), 16 F.3d 1537, 1539 (10th Cir.1994). It held the district court mistakenly determined the challenged program was authorized by STAA and STURAA, whereas, as stipulated for the purposes of the appeal, the SCC program is authorized by § 502 of the SBA, 15 U.S.C. § 644(g). Thus, the appeals court said, the constitutionality of STAA and

STURAA was not at issue. Nevertheless, it held the analysis of the SCC program under the SBA was identical to the district court's analysis under STAA and STURAA. *Id.* at 1543.

Applying the "lenient standard, resembling intermediate scrutiny" adopted in *Fullilove*, as further developed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), to assess the constitutionality of a federal race-conscious program, the court of appeals upheld the use of SCCs. Relying on these cases, the court reasoned the federal government, acting under authority of Congress and § 5 of the Fourteenth Amendment, can legislate affirmative action programs more freely than state or local governments. *Adarand II*, 16 F.3d at 1545. Further, the appeals court rejected as without legal authority Adarand's argument that a federal agency such as the CFLHD must make specific findings of past racial discrimination to justify the SCC program. *Id.*

Whereas Judge Carrigan had found the SCC program constitutional because it was similar to that upheld in *Fullilove* and was narrowly tailored to achieve its remedial objectives, the circuit court concluded the program was constitutional because eligibility was not based solely on racial or ethnic status but on economic disadvantage. *Id.* at 1547. Further, the SCC program was " 'appropriately limited in extent and duration' " as required by *Fullilove* in that it was subject to regular " 'reassessment and reevaluation by Congress.' " *Id.* (quoting *Fullilove*, 448 U.S. at 489, 100 S.Ct. at 2780.)

The circuit court emphasized, because the SCC program did not compel contractors to subcontract with

disadvantaged business enterprises ("DBEs"), but rather induced them to do so, it could not be said to violate equal protection requirements. *Id.* Finally, it acknowledged the lesson in *Fullilove* that " '[i]t is not constitutional defect in this program that it may disappoint the expectations of nonminority firms.' " *Id.* (quoting *Fullilove*, 448 U.S. at 484, 100 S.Ct. at 2778).

The United States Supreme Court granted certiorari to examine whether the proper standard of review had been applied by the Tenth Circuit. The Court vacated the circuit court's holding and held "[f]ederal racial classifications, like those of a state, must serve a compelling governmental interest and must be narrowly tailored to further that interest." *Adarand III*, 515 U.S. at 239, 115 S.Ct. at 2118. It remanded the case for evaluation in light of its conclusion that federal affirmative action programs, such as that at issue here, are subject not to intermediate, but to strict scrutiny review. *Id.*[4]

Writing for the majority, Justice O'Connor set forth the relevant federal laws and regulations at issue, and determined that Adarand had standing to challenge and obtain relief from SCC programs. *Id.* at 204-11, 115 S.Ct. at 2102-05. The Court then reviewed its previous decisions involving the Fifth Amendment's Due Process

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[4] Composing the majority in this case were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. Justice O'Connor wrote the Court's opinion. Justices Scalia and Thomas wrote concurring opinions. Justices Stevens, Souter, Ginsberg and Breyer dissented, each writing an opinion with the exception of Justice Breyer.

Clause[5] and the Fourteenth Amendment's Equal Protection Clause.[6] *Id.* at 213-14, 115 S.Ct. at 2106.

Tracing the Court's treatment of governmental classifications that have affected classes of people who have suffered societal discrimination, Justice O'Connor restated the principle of *Bolling v. Sharpe* 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954) that the equal protection components of the Fifth and Fourteenth Amendments are indistinguishable. *Adarand III*, 515 U.S. at 213-17, 115 S.Ct. at 2106-08. The majority emphasized it has consistently held that government racial classifications, whether created by federal or state governments, must be subjected to the "most rigid judicial scrutiny." *Id.* at 216, 115 S.Ct. at 2107 (quoting *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 89 L.Ed. 194 (1944)).

The Court noted it's [sic] struggle over the past twenty years to formulate the proper standard of review for affirmative action and minority assistance programs but had resolved the issue at least in part in *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Adarand III*, 515 U.S. at 219-21, 115 S.Ct at 2109-10. Justice O'Connor opined the Court's previous cases had analyzed governmental racial classifications with "skepticism," "consistency," and "congruence." *Id.* at 223-24, 115 S.Ct. at 2111.

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[5] "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[6] "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

According to the majority, the Court's decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) deviated from the long-standing principle that both federal and state governments are held to the same equal protection duty when it held that "benign" racial classifications created by the federal government are subject to intermediate scrutiny. *Adarand III*, 515 U.S. at 223-26, 115 S.Ct at 2111-12. *Metro Broadcasting*, Justice O'Connor wrote, ignored the essential precept that all governmental racial classifications, federal and state, must be strictly scrutinized. *Id.* The majority overruled *Metro Broadcasting* to the extent that a standard of review less than strict scrutiny would be applied in any racial classification, whether created by federal, state or local government. *Id.* at 227-28, 115 S.Ct. at 2113.

In conclusion, Justice O'Connor announced the application of strict scrutiny to all, including federal, racial classifications, would ensure that only those which are narrowly tailored to serve a compelling governmental interest are tolerated. Finally the majority stated it wished to dispel the notion that "strict scrutiny is 'strict in theory, but fatal in fact.' " *Id.* at 237, 115 S.Ct. at 2117 (quoting *Fullilove*, 448 U.S. at 519, 100 S.Ct. at 2795) (Marshall, J., concurring in judgment). The case was remanded to the lower courts for determination of the constitutionality of the SCC under a strict scrutiny standard.

II. *Standards for Summary Judgment*

Under Federal Rule of Civil Procedure 56(c),

> [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. . . .
>
> While the movant bears the burden of showing the absence of a genuine issue of material fact, the movant need not negate the non-movant's claim but need only point to an absence of evidence to support the non-movant's claim. If the movant carries this initial burden, the non-movant may not rest upon its pleadings, but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant.

Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996) (quoting *Wolf v. Prudential Ins. Co.*, 50 F.3d 793, 796 (10th Cir.1995)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

III. *Directives upon Remand.*

Justice O'Connor noted several issues which must be addressed in determining whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny. *Adarand III*, 515 U.S. at 237-38, 115 S.Ct. at 2118.

According to the majority opinion, the circuit court, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It did not address whether the interests served by the use of subcontractor compensation clauses are compelling. *Id.* Nor, Justice O'Connor said, did the Tenth Circuit address the issue of narrow tailoring in terms of strict scrutiny cases which have asked, for example, "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Id.* (quoting *Croson*, 488 U.S. at 507, 109 S.Ct. at 729). The circuit court also did not consider "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effect it is designed to eliminate.' " *Id.* (quoting *Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93).

Justice O'Connor found "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id.* Whereas the SBA's 8(a) program requires individualized inquiry into the economic disadvantage of every participant, 13 C.F.R. § 124.106(a) (1996), the DOT regulations implementing STURAA § 106(c) require no such individualized inquiry by the certifying

authority, 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).

Nor, the Court noted, are the regulations clear as to whether 8(d) subcontractors must make individualized showings or whether the race-based presumption applies to social as well as economic disadvantage. *See* 13 C.F.R. § 124.106(b) (1996) (seemingly requiring such contractors to make an individualized showing), as compared with 48 C.F.R. § 19.703(a)(2) (1995) (apparently allowing them to invoke the race-based presumption for social and economic disadvantage). *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

Justice O'Connor further noted "an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs." *Id*. Regulations relating to 8(a) participants require a showing that such person's ability to compete has been impaired "as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.106(a)(1)(i) (1996). Those governing 8(d) programs merely require a showing "as compared to others in the same or similar line of business." § 124.106(b)(1). The majority directed the lower courts to consider if distinctions such as these may have relevance to the question of whether the way in which the government uses subcontractor compensation clauses can survive strict scrutiny.

IV. *The Complex Regulatory Regimes.*

In the First Amended Complaint, filed January 22, 1996, Adarand seeks, *inter alia*, a declaration that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of its constitutional rights. (First Am. Compl. ¶¶ 6, 8-21, 31, and Prayer for Relief).

In brief, Adarand states it has challenged as unconstitutional "all of the statutory provisions from which [the] Defendants claim authority to award highway construction contracts in Colorado on the basis of race." (Pl.'s Reply Mem. at 1 n. 1).[7] This is somewhat broader than the Supreme Court's characterization of the issue before this court, namely "whether any of the ways in which the federal government uses subcontractor clauses can survive strict scrutiny. . . . " *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

As the Court noted, this case concerns "complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id*. First, a number of provisions in the SBA, are implicated. According to the SBA, it is the policy of the United States that

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[7] Adarand's standing to raise these issues is discussed below.

> small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts. . . .

15 U.S.C. § 637(d)(1).

In order to achieve these goals, § 637(d) (the "8(d) program") requires that certain language be included in all contracts, with three limited exceptions, let by federal agencies. The required clause includes the policy statement set out above, and further states: "The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract." 15 U.S.C. § 637(d)(3)(B).

A "small business concern owned and controlled by socially and economically disadvantaged individuals" is defined as a small business concern "which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals," and "whose management and daily business operations are controlled by one or more of such individuals." 15 U.S.C. § 637(d)(3)(C)(i) and (ii). The SBA also requires the following contractual language:

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be

> disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.
>
> . . . . .
>
> Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as . . . a small business concern owned and controlled by socially and economically disadvantaged individuals. . . .

15 U.S.C. §§ 637(d)(3)(C), 637(d)(3)(E).

The finding "by the Administration" in the quoted passage refers to certification by the Small Business Administration under the 8(a) set aside program. *See* 15 U.S.C. § 637(a). Unlike the 8(d) program described above, which mandates the inclusion of the described clause in contracts between federal agencies and general contractors, the 8(a) program substantially alters the federal contracting process by allowing the Administration to act as an intermediary between a contracting agency and the end contractors who are to perform the work. *Compare* 15 U.S.C. § 637(a) with 15 U.S.C. § 637(d).

When the 8(a) program is invoked, the Administration may "enter into contracts with the United States Government and any department, agency, or officer thereof . . . to furnish articles, equipment, supplies, services, or materials . . . or to perform construction work for the Government." 15 U.S.C. § 637(a)(1)(A). The Administration will then "arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns. . . . " who have been

certified as § 8(a) program participants. 15 U.S.C. § 637(a)(1)(B).

Section 637(a)(1)-(21) and the implementing regulations at 13 C.F.R. §§ 124.100-124.113 (1996) provide an elaborate set of guidelines to be used by the Administration in deciding whether a business is eligible for the 8(a) program, including general definitions of social and economic disadvantage.[8]

Under the SBA, "socially disadvantaged" persons are those "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member [sic] of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5).

The regulations augment this definition, stating that, in the absence of evidence to the contrary, individuals claiming membership in certain racial groups, including Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans, are presumptively designated as socially disadvantaged for the purposes of the SBA. 13 C.F.R. § 124.105(b) (1996). Individuals who are not members of the designated groups, but who desire to participate in the 8(a) program must establish, "on the basis of clear and convincing evidence," that they meet a five part test in order to be certified as socially disadvantaged. 13 C.F.R. § 124.105(c) (1996).

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[8] As discussed below, these definitions are used to supplement the eligibility thresholds for § 8(d) of the SBA and the meaning of "social and economic disadvantage," as applied under the 8(d) program, is adopted by both STURAA and ISTEA.

The first part of this test is that the claimed social disadvantage "must stem from . . . color, ethnic origin, gender, physical handicap, [or] long-term residence in an environment isolated from the mainstream of American society. . . . ' " § 124.105(c)(1)(i). In addition, the regulations require that an individual not belonging to one of the specified groups prove that "he or she has personally suffered social disadvantage," that the claimed disadvantage is "rooted in treatment which he or she has experienced in American society, not in other countries," is "chronic and substantial, not fleeting or insignificant," and has "negatively impacted on his or her entry into and/or advancement in the business world." § 124.105(c)(1) (ii) to (v).

"Economically disadvantaged" individuals are defined by § 8(a) of the SBA as socially disadvantaged persons "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). As the Supreme Court recognized in *Adarand III*, the regulations provide two different standards for designation as "economically disadvantaged," depending on whether the question arises under the 8(a) program or the 8(d) mandates. 515 U.S. at 207-08, 115 S.Ct. at 2103.

Section 124.106(a) defines economic disadvantage for the purposes of the 8(a) program by comparing the individual seeking certification with "others in the same or similar line of business *who are not socially disadvantaged*. . . . " 13 C.F.R. § 124.106(a) (1996) (emphasis added). By contrast, § 124.106(b), which applies to "the

section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status," requires the Administration to compare an individual seeking designation as "economically disadvantaged" only with "others in the same line of business. . . . " 13 C.F.R. § 124.106(b) (1996).

Under both § 124.106(a) and § 124.106(b), the Administration determines economic disadvantage by examining "[t]he personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets." 13 C.F.R. § 124.106(a)(2) (1996); 13 C.F.R. § 124.106(b)(1) (1996).

However, for the purposes of the 8(d) and other programs requiring SBA's determination of disadvantaged status, the Administration is required to "apply standards to each factor that are *less restrictive* than those applied when determining economic disadvantage for the purposes of the 8(a) program." 13 C.F.R. § 124.106(b)(1) (1996) (emphasis added). According to the regulations, this approach "corresponds to the Congressional [sic] intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal [sic] procurement programs for . . . socially and economically disadvantaged individuals."[9] 13 C.F.R. § 124.106(b)(1) (1996).

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[9] The regulations limit overall participation in the 8(a) program, or the program term, to a period of nine years from the date of certification. 13 C.F.R. § 124.110 (1996). An 8(a) business concern may be "graduated from the program" when it has achieved the "targets, objectives and goals set forth in its business plan prior to the expiration of its Program Term [sic], and has demonstrated the ability to compete in the marketplace without assistance under the 8(a) program." 13 C.F.R. § 124.208(a) (1996). In addition to graduation, an 8(a) participant can also have its program term prematurely terminated "for good cause," which includes the occurrence of any of twenty-five events listed in 13 C.F.R. § 124.209(a) (1996).

This "less restrictive" examination may be at odds with the plain language of the SBA itself, insofar as the 8(d) provisions direct prime contractors to "presume that socially and economically disadvantaged individuals include [the specified racial groups] or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C). This language, standing alone, grants the presumption of both social and economic disadvantage (and thus eligibility for programs relying on the 8(d) usage of these terms) to members of the listed minority groups without reference to their economic status, in addition to allowing those actually found to be economically disadvantaged under the requirements of § 8(a) to qualify.

As Justice O'Connor noted, a further set of regulations implementing the 8(d) program supports this reading by stating that "[i]ndividuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged." *Adarand III*, 515 U.S. at 207, 115 S.Ct. at 2103 (quoting 48 C.F.R. § 19.001 (1996)); *see also* 48 C.F.R. § 19.703(a)(2)

(1996) (allowing individuals "who certify that they are members of [the] named groups . . . [to] represent themselves as socially and economically disadvantaged").

Clearly, the SBA statutory language creating the 8(d) program is inconsistent with certain regulations governing certification of social and economic disadvantage in addition to the regulations themselves being mutually inconsistent. This leaves "some uncertainty as to whether the 8(d) subcontracting program requires an individualized showing of economic disadvantage." *Adarand III*, 515 U.S. at 207, 115 S.Ct. at 2103.

While the regulations at 13 C.F.R. 124.106(b) (1996) inquire into the actual financial condition of the applicant, the plain language set forth in § 637(d) of the SBA and the regulations at 48 C.F.R. 19.001 (1996), do not require such an inquiry in determining eligibility for the 8(d) program. This demonstrates that the framework of the SBA permits the promulgation of regulations which, like § 8(d) itself, allow a presumption of both social and economic disadvantage based entirely on membership in certain racial groups.

Under both the 8(a) and the 8(d) programs, the race-engendered presumptions of disadvantage may be rebutted if a third party comes forward with evidence that the participant in question is not, in fact, socially or economically disadvantaged. *See* 13 C.F.R. §§ 124.111(c)-(d) and 124.601-609 (1996). Adarand points out that only third parties may come forward to initiate a rebuttal of presumptive disadvantage, and that no such duty falls upon the Defendants or any other governmental entity.

The SBA further provides "[t]he President shall annually establish Government-wide [sic] goals for procurement contracts awarded to . . . small business concerns owned and controlled by socially and economically disadvantaged individuals. . . . " 15 U.S.C. § 644(g)(1). This goal "shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.*

In addition, the SBA requires each federal agency to establish goals for the participation by small business concerns owned and controlled by socially and economically disadvantaged individuals in procurement contracts of such agency. 15 U.S.C. § 644(g)(2). These goals "shall realistically reflect the potential of . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . to perform such contracts and to perform subcontracts under such contracts." *Id.*

As the Court noted in *Adarand III*, 515 U.S. at 205-07, 115 S.Ct. at 2102, the goals described in 15 U.S.C. § 644(g)(1) and (2) are in furtherance of the policy stated in 8(d)(1), that small business concerns owned and controlled by socially and economically disadvantaged individuals have the maximum opportunity to participate in the performance of contracts let by any federal agency.

The FHA's own goal as applied to its Federal Lands Highway Program (FLHP), and thus to contracts let by the CFLHD was "somewhere around 12[to] 15 percent" at times pertinent to this litigation. (Defs.' Supp'l Ex. Supp. Mot. Summ. J., Depo. James L. Robinson, CFLHD Engineer, ("Robinson Depo.") at 44, line 16.) Statements on the

record also indicate that when this goal was not met, CFLHD officials would receive a "chat from a supervisor." *Id* at 45, line 19.

In addition to the minimum 5 percent goal provided by the SBA and the 12 to 15 per cent goals adopted by the FHA and applied to the CFLHD pursuant to § 644(g) of the SBA, the contract at issue was also subject to goals included in STURAA and ISTEA, both DOT appropriations measures.

It is undisputed that the initial funding for the West Dolores project and the contract at issue was provided by the Highway Trust Fund under STURAA. ISTEA later superseded STURAA and provided the funding for change orders and supplemental agreements for the West Dolores project.

Section 106(c)(1) of STURAA requires that "not less than 10 percent" of the funds appropriated under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." 101 Stat. 145. ISTEA, in § 1003(b), adopts the 10 percent goal found in STURAA. 105 Stat. 1919.

Significantly, both STURAA and ISTEA state the term "socially and economically disadvantaged individual[s]" has the meaning of such term under § 8(d) of the SBA "and relevant subcontracting regulations promulgated pursuant thereto." STURAA § 106(c)(2)(B), 101 Stat. 146; ISTEA § 1003(b)(2)(B), 105 Stat. 1919-1920. Accordingly, under STURAA and ISTEA, the race-based presumption contained in 15 U.S.C. § 637(d) applies for the purposes of determining both social and economic disadvantage,

although the somewhat contradictory regulations promulgated pursuant to the SBA also apply. Thus, business concerns owned and controlled by Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, in addition to other groups or individuals certified under the more restrictive tests provided by the SBA's 8(a) program are considered both socially and economically disadvantaged for the purposes of STURAA and ISTEA. 101 Stat. 146; 105 Stat. 1919-20; 15 U.S.C. § 637(d)(3)(C); 13 C.F.R. § 124.106(b) (1996).

The Secretary of Transportation, pursuant to the requirements in STURAA, established "minimum uniform criteria for State governments to use in certifying whether a concern qualifies" for purposes of meeting the act's goals for disadvantaged businesses. STURAA § 106(c)(4), 101 Stat. 146. These regulations require the certifying authority to presume both social and economic disadvantage (i.e., eligibility to participate) if the applicant belongs to the listed racial groups (or is a woman). 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).[10] As with the SBA programs, third parties may

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[10] The latter regulations entitled "Guidance for making Determinations of Social and Economic Disadvantage" are illustrative of Justice Stevens' comment that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 534-35 n. 5, 100 S.Ct. at 2803 n. 5 (Stevens J. dissenting). I refer in particular to the following:

Recipients should continue the existing practice of making their own judgments about whether the individual is in fact a member of one of the presumptive groups. If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is

come forward with evidence to rebut the presumption of disadvantage for any particular business. 49 C.F.R., Subpt. D, App. C (1995).

The SCC challenged by *Adarand* in this action was developed by the FHA under the FLHP as a means to comply with the minimum 5 percent goals provided by § 644(g) of the SBA, the 12 to 15 percent goals adopted by the FHA pursuant thereto, and the 10 percent goals set forth in STURAA and ISTEA.[11] A uniform version of the SCC was established by the Administrator of the FLHP in early 1981. (Defs.' Stmt. Undisp. Mat. Facts ¶ II.A.31.)

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unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experiences [sic]. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis. 49 C.F.R., Subpt. D, App. C (1995).

[11] The Defendants note the CFLHD has sought to meet the DBE goals established by the SBA, STURAA and ISTEA in several ways, including: 1) contract awards to small disadvantaged business as prime contractors; 2) contracts made with the SBA and set aside for 8(a) certified program participants pursuant to the SBA's 8(a) program; and 3) through subcontracting by prime contractors to small disadvantaged businesses, including such contracts under the SCC. (Defs.' Stmt. Undisp. Mat. Facts ¶ 31, n. 7.) The Defendants maintain, and Adarand does not dispute, that the challenge in this action is based only on the use of the SCC to meet the various goals. *Id.*

The SCC at issue reads:

108.01 *Subcontracting*. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. . . .

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency [sic]. Certification by other Government [sic] agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer [sic] has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor [sic] requests payment under this provision, the Contractor [sic] shall furnish the Engineer [sic] with acceptable evidence of the subcontractor(s) [sic] DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor [sic] to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field. The Contractor [sic] shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. . . .

. . . . .

The Contractor [sic] will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

The Contractor [sic] will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

(Defs.' Mot. Summ. J., Ex. 1 at I-24, I-25.)

Mountain Gravel, the prime contractor in this case, had to hire a subcontractor certified as a DBE in order to benefit from this SCC. In addition, the terms of the SCC allowed the additional financial benefits to attach to Mountain Gravel only where more than 10 percent of the original contract amount was awarded to one or more DBEs.

As explained, DBE certification can come from one of three basic sources, all part of the statutory authority giving rise to the use of SCCs. First, a business may be granted DBE status as an ancillary benefit to meeting the requirements for certification as a participant in the SBA's

8(a) program. 15 U.S.C. § 637(a). A business so certified, while entitled to a presumption of social disadvantage if owned and controlled by individuals belonging to certain minority groups, is still required to prove actual economic disadvantage. *Id.* However, a business like Adarand, which is not owned by members of the listed racial groups is required to meet a rigid five-part test before a finding of social disadvantage can be made. 13 C.F.R. § 124.105(c) (1996).

Second, a business can be certified as a DBE under the less restrictive requirements set forth in the SBA's 8(d) provisions. 15 U.S.C. § 637(d). The statutory language enacted by Congress appears to grant a race-based presumption of both social and economic disadvantage, such that one could conceivably be certified as a DBE under the 8(d) program on the basis of race alone. *Id.* However, as noted, the regulations appear to require some showing of actual economic disadvantage – albeit under some lesser standard than required for the same finding under § 8(a). *See* 13 C.F.R. § 124.106(b) (1996).

Third, a concern can be certified by a state highway agency pursuant to the DOT regulations, which like the 8(d) SBA provisions, provide for race-based presumptions of both social and economic disadvantage. 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995).

Under the SCC at issue, "a small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government [sic] agencies . . . may be acceptable on an individual basis . . . " (Defs.' Mot. Summ. J., Ex. 1 at I-24.)

At the time of the challenged award, the CFLHD did not itself certify businesses as DBEs. Gonzales was certified as a DBE by the State of Colorado Department of Highways in 1985 pursuant to STURAA and the implementing DOT regulations. *See* 49 C.F.R. § 23.62 (1995); 49 C.F.R. pt. 23, subpt. D, App. C (1995) (Stmt. Mat. Facts Not Disp. ¶ 36; Defs.' Stmt. Undisp. Mat. Facts, ¶ 19.) In granting Gonzales DBE certification, the State of Colorado presumed that Frankie Gonzales was both socially and economically disadvantaged. (Stmt. Mat. Facts Not in Dispute ¶ 35.)

V. *Standing.*

Adarand seeks a declaration that § 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g) and the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand of its constitutional rights. (First Am. Compl. pp 6, 8-21, 31, and Prayer for Relief).

In reviewing the issue of standing, the Supreme Court concluded Adarand has standing to seek forward looking relief against any future use of subcontractor compensation clauses. *Adarand III*, 515 U.S. at 211-12, 115 S.Ct. at 2105. Based on the deposition testimony of Adarand's general manager to the effect that the company bid on every guardrail project in Colorado, the Court found Adarand had "made an adequate showing that sometime in the relatively near future it will bid on

another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." *Id.*

The Court noted it is not necessary for the aggrieved party to allege that it " 'would have obtained the benefit but for the barrier in order to establish standing.' " *Id.* (quoting *General Contractors v. Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)). This renders any dispute of fact as to the reason why Mountain Gravel awarded the contract to Gonzales rather than to Adarand neither material to, nor preclusive of, the entry of summary judgment.

On the issue of standing, the Defendants assert Plaintiff's description of the alleged components of the race-based program encompasses § 8(a) of the SBA, 15 U.S.C. § 637(a), and the DOT "federal aid" grants to state and local governments funded, in part, by STURAA and ISTEA. These allegations, the Defendants argue, are beyond the scope of this litigation because Adarand has limited its constitutional challenge to highway construction contracting in Colorado. (Am. Compl., Prayer for Relief, pp 1, 2.) Further, the Defendants state, Adarand has not alleged nor offered any evidence that it could have bid on any DOT federal aid or 8(a) projects in Colorado. Accordingly, the Defendants maintain Adarand lacks standing to challenge 15 U.S.C. § 637(a) and its implementing regulations nor any aspect of STURAA, ISTEA, or 49 C.F.R. Part 23 (1995) that goes beyond the SCC.

In reply, Adarand states its challenge is not solely to the SCC but to all of the statutory provisions from which

the Defendants claim authority to award highway construction contracts in Colorado on the basis of race. It maintains each of the statutes and regulations it cites in the Amended Complaint are at issue. STURAA and ISTEA provided the funding for the West Dolores Project on which Adarand was denied the guardrail subcontract; both statutes incorporate the presumption for minority groups listed in 15 U.S.C. § 637(d) and other groups listed in 13 C.F.R. § 124.105(b) (1996).

The SBA, 15 U.S.C. § 637(d)(1), (2), and (3), states that DBEs "shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency," and all such contracts shall include certain language, including the statement that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged" Further, the SBA, 15 U.S.C. § 644(g) states each federal agency shall set goals for DBE participation that will represent "the maximum practicable opportunity."

Adarand notes the regulations implementing the SBA are found at 13 C.F.R. § 124.101 *et seq.* (1996), 48 C.F.R. § 19.000 (1995) and 48 C.F.R. § 52.219-8 (1996). Section 124.101 states that to participate in the 8(a) program, an individual must meet all the requirements set forth in § 124.102 through § 124.109. 13 C.F.R. § 124.101 (1996). Section 124.105 defines "social disadvantage" and states that members of certain minority groups are presumed to be "socially and economically disadvantaged." 13 C.F.R. § 124.105 (1996).

Adarand points out 48 C.F.R. § 19.001 (1996) is the definition section, containing a definition of small, disadvantaged business concern, while § 19.703 states that to be eligible as a subcontractor under the program, a concern must be a small business or a DBE and that "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans" are presumed to be DBEs. Further, 48 C.F.R. § 52.219-8 (1996) has the same presumption as 15 U.S.C. § 637(d).

Finally, Adarand asserts, 49 C.F.R. Part 23 (1995) implementing STURAA and ISTEA, 49 C.F.R. § 23.53 (1995) sets forth the requirements to qualify as a DBE (referred to as "MBE"), and § 23.62 presumes certain minority groups to be both "socially and economically disadvantaged" and forbids the State of Colorado from investigating either the social or economic status of members of those groups.[12]

Adarand states these are the statutory provisions the Defendants claim gave them authority to award contracts in the Colorado highway industry based on race. Because this lawsuit implicates all the aforesaid statutes and regulations, Adarand argues it has standing to challenge each of these statutory provisions. The SCC, Adarand declares, is one method the Defendants use to implement the race-based statutes at issue, and therefore each of the statutes is unconstitutional as applied in this case.

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[12] The State of Colorado apparently used these regulations in certifying Gonzales Construction, which was awarded the guardrail subcontract on the West Dolores Project.

The Supreme Court concluded Adarand has standing to seek forward-looking relief in the form of declaratory and injunctive relief against any future use of subcontractor compensation clauses. *Adarand III*, at 211-12, 115 S.Ct. at 2105. The Court noted the facts of the case "implicate a complex scheme of federal statutes and regulations to which we now turn." *Id.* at 205, 115 S.Ct. at 2102. It then discussed the relevant statutes and regulations as set out above.

In concluding the majority opinion, Justice O'Connor noted "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses." *Id.* at 238, 115 S.Ct. at 2118. The Court then reiterated the various statutes and regulations at issue. It has therefore determined that Adarand has standing to challenge the race-based program involving use of SCCs, and, by implication, all those statutes and regulations forming the basis of such program. This includes the race-based presumptions of disadvantage that form the basis for DBE certification in most circumstances, as well as the SBA, STURAA, and ISTEA provisions that establish percentage "goals" for federal contract participation by concerns presumed eligible.

Adarand does not challenge the SBA's 8(a) program, 15 U.S.C. § 637(a), in and of itself, although the FLHP uses that program to meet the DBE participation goals established by § 644(g) of the SBA and § 106(c) of STURAA. Nor do I believe Adarand would have standing to do so, since the 8(a) program does not involve the use of SCCs. Nevertheless the 8(a) program, 15 U.S.C. § 637(a), and regulations promulgated thereunder are

implicated to the extent that the definitions of "social and economic disadvantage" contained therein are used to supplement the definition of those terms under the SBA's § 8(d) program and implementing regulations.

VI. *Strict Scrutiny.*

In remanding this case to the lower courts, the Court directed them to determine "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Adarand III*, 515 U.S. at 238, 115 S.Ct. at 2118.

"[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws [under the Fifth or Fourteenth amendment] has not been infringed." *Adarand III*, at 227, 115 S.Ct. at 2112. "All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.*

The strict scrutiny test involves two questions. The first is whether the interest cited by the government as its reason for injecting the consideration of race into the application of law is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the government is concerned. The second is whether the government has narrowly tailored its use of race, so that race-based classifications are applied only to the extent absolutely required to reach the proffered interest.

A "compelling" interest is required "because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic. . . . " *Fullilove*, 448 U.S. at 533-535, 100 S.Ct. at 2803-04 (Stevens, J., dissenting). The use of race must be "narrowly tailored" to the achievement of that interest because racial preferences create both a benefit and a burden, and when the burden touches "upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 98 S.Ct. 2733, 2753, 57 L.Ed.2d 750 (1978) (opinion of Powell, J).

The strict scrutiny test is thus a recognition that while classifications based on race may be appropriate in certain limited legislative endeavors, such enactments must be carefully justified and meticulously applied so that race is determinative of the outcome in only the very narrow circumstances to which it is truly relevant. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986) (plurality opinion of Powell, J.) (" 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees' ") (quoting *Fullilove*, 448 U.S. at 491, 100 S.Ct. at 2781).

A. *Compelling Governmental Interest.*

Compelling interest is the linchpin of constitutionality under strict scrutiny. The narrow tailoring requirement comes into play only when the governmental action under review is shown to be supported by such interest. Justice O'Connor noted "[t]he Court of Appeals did not decide the question of whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling.' " *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. In remanding the case, however, the Court did not give any meaning to the phrase "compelling interest," either by a definition or by illustration.

In view of my conclusion that the SCC program is not narrowly tailored so as to pass strict scrutiny muster, the following determination concerning compelling governmental interest may be regarded as *obiter dicta*. Nevertheless, I consider the discussion of compelling interest to be important, particularly in light of the lacuna left by the Court on the subject when it remanded the case.

There appears to be only one compelling interest recognized by the Supreme Court to justify racial classifications, namely remedying past wrongs. *See Croson*, 488 U.S. at 493, 109 S.Ct. at 722 (plurality opinion) ("[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). However, " '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.' " *Id.* at 497, 109 S.Ct. at 724 (quoting *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848). Further, consideration of race or

ethnicity by a university for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.1996) (citing Powell J.'s opinion in *Bakke*, noting that, although it was not binding, no case since has accepted diversity as a compelling state interest under a strict scrutiny analysis).

Adarand argues the Defendants have not shown a compelling governmental interest in the use of race to award federal contracts, asserting that they admit there has been no previous discrimination by them on the basis of race in awarding of federal highway construction contracts in Colorado. Relying on *Croson's* requirement that there must be specific findings of past state-sponsored discrimination before adopting a race-based remedy, Adarand maintains Congress has adopted such a remedy in the absence of any history of state-sponsored discrimination.

Adarand further argues the evidence proffered by the Defendants to support the adoption by Congress of the race-based program reveals at most two isolated incidents of discrimination. Moreover, Adarand states the officials who managed the federal government highway construction program in the states that comprise the CFLHD testified they knew of no studies or evidence that showed discrimination in the highway construction industry in Colorado.

Citing *Croson*, 488 U.S. at 497, 109 S.Ct. at 723-24, and *Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848, Adarand claims there must be particularized findings that the federal government has discriminated on the basis of race in the

awarding of federal highway construction contracts in Colorado. According to Adarand, the Defendants have not presented any particularized findings of discrimination by federal actors in the highway construction industry.

The Defendants argue Adarand has misconstrued *Croson* and *Wygant* and failed to recognize Congress' unique role as the national legislature. They state Adarand's reliance on *Croson* and *Wygant* is misplaced as it fails to recognize the fundamental differences between the national legislature, which authorized the programs at issue here, and the state and local bodies which promulgated the programs at issue in those cases.

According to the Defendants, Congress has the authority and obligation to address the nationwide problem of discrimination against DBEs in the construction industry with national legislation. While *Adarand III* clarified that affirmative action programs enacted by Congress are subject to strict scrutiny, the Defendants contend the Court did not question Congress' authority under § 5 of the Fourteenth Amendment, the enforcement clauses of the Thirteenth and Fifteenth Amendments, the Commerce Clause or Spending Power, to impose broad measures for remedying discrimination that impacts victims nationwide.

The Defendants maintain the Court has consistently distinguished the broad constitutional authority given Congress to remedy discrimination from the limited power of state and local governments. "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and

their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an *explicit* constraint on state power, and the states must undertake any remedial efforts in accordance with that provision." *Croson*, 488 U.S. at 490, 109 S.Ct. at 720 (emphasis in original).

Since Congress' scope of authority differs from that of states and local governments, the Defendants argue, the evidence required to demonstrate a compelling governmental interest to exercise its authority will likewise be different. It is the Defendants' position that Congress is not required to make the specific detailed analysis set forth in *Croson* to demonstrate a compelling governmental interest for Congress' action under a strict scrutiny standard of review.

Adarand responds that all of the arguments made by the Defendants that Congress has unique powers to remedy nationwide discrimination were already rejected by the Supreme Court in *Adarand III* ("The Court's concept of 'congruency' assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical differences between federal and state or local decision makers." *Adarand III*, 515 U.S. at 249, 115 S.Ct. at 2123 (Stevens, J. dissenting)).

Moreover, Adarand states the dissents filed in *Adarand III* reflect the majority opinion rejected the argument that *Fullilove* controls the decision of this court. ("The statutory scheme must be treated as constitutional

if *Fullilove v. Klutznick* is applied." *Id.* at 265, 115 S.Ct. at 2131 (Souter J., dissenting.)). Finally, Adarand relies on the majority's remark that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling," *Adarand III*, 515 U.S. at 235, 115 S.Ct. at 2117. Thus, states Adarand, the strict scrutiny standard of review required of Congress is the same as that required of state or local governments.

The Defendants reply there is no dispute that congressionally-enacted affirmative action programs are subject to strict scrutiny. However, they state, the issue is whether congressional actions should be assessed as if Congress were limited to the same powers and jurisdictional scope as a local government entity, as Adarand argues. It is the Defendants' position that Congress, unlike state and local governments, legislates on a nationwide basis that must be recognized by this court. This, the Defendants maintain, is not inconsistent with the strict scrutiny standard, but is rather a factor be taken into account in applying it.

The diametric arguments of the parties concerning what constitutes a compelling governmental interest for Congress and the evidence required to establish such interest are not surprising. They reflect the majority's failure in *Adarand III* to define the parameters of Congress' powers under § 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

While Justice O'Connor unified state and federal race-conscious remedies under one analytical standard,

her opinion failed to define the parameters of Congress' Section 5 powers. Noting that various members of the Court have taken different views of Congress' Section 5 powers, Justice O'Connor stated "[w]e need not, and do not, address these differences today." *Adarand III*, 515 U.S. at 231, 115 S.Ct. at 2114. Not surprisingly, Justice O'Connor side-stepped this issue of Congress' acknowledged unique Section 5 powers, since addressing it would have opened a Pandora's box that would have significantly weakened the notion of congruence.

Later in the same paragraph, however, the majority stated that "Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject . . . is incorrect." *Id.* Thus, it appears that Justice O'Connor's assertion in Croson, that Congress has the ability under Section 5 to recognize and address racial discrimination, has been left undisturbed.

Given the uncertainty as to the extent to which courts should defer to Congress' Section 5 authority, I nevertheless find no support for Adarand's contention that the Defendants' use of the SCC in Colorado will pass constitutional muster only if Congress made particularized findings of discrimination in the highway industry in Colorado. Adarand's reliance on *Croson* in this regard is misplaced. There, Justice O'Connor noted

> other governmental entities might have to show more than Congress before undertaking race-conscious measures: "The degree of specificity required in the findings of discrimination and the breadth of the discretion in the choice of remedies may vary with the nature and authority of the governmental body."

Croson, 488 U.S. at 489, 109 S.Ct. at 719 (quoting *Fullilove*, 448 U.S. at 515-16, n. 14, 100 S.Ct. at 2794, n. 14 (Powell, J., concurring)). Further, Justice O'Connor stated: "The city [of Richmond] is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action." *Croson*, 488 U.S. at 491, 109 S.Ct. at 720.

In *Oregon v. Mitchell*, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), the Court recognized Congress' authority to legislate nationwide remedies to nationwide problems. There, the State of Arizona argued that application of a congressional ban on the use of literacy tests nationwide was improper because the racial discrimination Congress was addressing arose elsewhere in the country. *Id.* at 233, 91 S.Ct. at 319. The Court held unanimously that Congress was not required to make independent findings that circumstances in a particular state met with Congress' assessment of a national problem before federal law could be applied to that state. *Id.*

> In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is – a serious national dilemma that touches every corner of our land. In this legislation Congress had recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problem of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 133-34, 91 S.Ct. at 269 (citation omitted).

The amici brief, supporting the Defendants, cites *Croson* to the effect that "Congress, unlike any State . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." 488 U.S. at 490, 109 S.Ct. at 720. This includes "the power to define situations which [it] determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Id.* While this idea is consistent with the authority recognized in *Oregon v. Mitchell*, it may not prove dispositive regarding the use of racial classifications challenged here. Indeed, a fundamental distinction is being lost.

The congressional enactment at issue in *Mitchell* represented a clear example of a "prophylactic rule." It was a ban, a protective barrier designed to prevent a racial harm, namely the use of literacy tests to exclude African Americans from voting at the polls. The SCC, however, is more reparational than prophylactic in nature. The contract clause here seeks to overcome racial barriers, not by prohibiting them at their source, but by using financial incentives to encourage prime contractors to pass over low bidding subcontractor firms not owned by members of certain minority groups. Enforcing the right to vote of a member of a minority group does not require, *ipso facto*, the denial of that same right to anyone else.

Regardless, nothing in *Adarand III* or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress' ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council. To the contrary, Justice O'Connor's majority

opinion states: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2117.

There is also little support for Adarand's argument that the Defendants must show that the federal government itself has discriminated against minority highway construction firms. Neither *Adarand III* nor *Croson* require such showing. In *Croson*, the Court recognized that "if the city could show that it had essentially become a 'passive participant' [by providing funding] in a system of racial exclusion practiced by elements of the local construction industry, . . . the city could take affirmative steps to dismantle such a system." 488 U.S. at 492, 109 S.Ct. at 721 (plurality opinion).

I conclude the requisite particularized findings of discrimination to support a compelling governmental interest for Congress' action in implementing the SCCs under a strict scrutiny standard of review would include findings of discriminatory barriers facing DBEs in federal construction contracting nationwide, rather than in a single state, whether such barriers were as a result of intentional acts of the federal government or "passive complicity in the acts of discrimination by the private sector." *Croson*, 488 U.S. at 519, 109 S.Ct. at 735 (Kennedy, J. concurring in part). Such a standard, while acknowledging the Court's requirement that there be findings of discrimination in the specific industry where alleged discrimination is sought to be remedied, *see Croson*, 488 U.S. at 497-99, 109 S.Ct. at 724, takes into account Congress'

responsibility to address nation-wide problems with nation-wide legislation.

The recognition that Congress' unique role as a national legislature allows it to look at the whole of the United States for situations that may generate a compelling governmental interest in applying race-based remedies does not end the inquiry. Even in looking at this broader picture, Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications.

The parties are in substantial disagreement as to the evidence Congress must provide before an interest becomes compelling enough to allow the consideration of race to be codified into a federal enactment. The Defendants attach Appendix I to their memorandum in support of their motion for summary judgment. This, they submit, reflects evidence of discrimination by private parties, state governments and the federal government in the construction industry. The amici supplement this evidence with additional evidence presented in an appendix to their brief.

The Defendants contend the evidence demonstrates the existence of a wide variety of active and passive discrimination by public and private parties against minority businesses in construction contracting. Congress, they argue, enacted the SCC to serve the compelling governmental interest of remedying the effects of these types of discrimination.

Adarand claims the evidence submitted is of "[s]ocietal discrimination, without more," *Croson*, 488 U.S. at 497,

109 S.Ct. at 724, as such, is "an inadequate basis for race-conscious classifications," *id.*, and does not constitute the requisite particularized findings in the specific industry where the alleged discrimination is sought to be remedied, *id.* at 499, 109 S.Ct. at 724-25. According to Adarand, the evidence set forth in Appendix I is nothing more than iteration of statements by representatives who were sponsoring legislation and cannot be described as evidence of discrimination showing a compelling government interest. *See id.* at 500, 109 S.Ct. at 725. Nor, Adarand argues, is there any evidence of discrimination against all the groups Congress presumes to be "socially and economically disadvantaged" in 15 U.S.C. § 637(d)(3)(C) and 13 C.F.R. § 124.105(b) (1996).

Appendix I recounts the relevant legislative history of the Small Business Administration concerned with developing small businesses, including those owned by socially and economically disadvantaged individuals and providing them with opportunities to participate in the economy, including the construction industry. Although some of the quotations in the appendix are by Senators or Congressmen who sponsored the bills, the Defendants submit this does not diminish the fact that Congress reasonably and correctly believed that the evidence of discrimination presented was sufficient to require corrective measures.

I agree with the Defendants in this regard. There is a fundamental difference between the record of congressional hearings, including the statements by members of Congress, submitted with the Defendants' brief, and the "highly conclusionary statement of a proponent" of the plan challenged in *Croson*. 488 U.S. at 500, 109 S.Ct. at

725. Justice O'Connor's opinion in *Croson* did not dispute Congress' ability to make such findings, nor the validity of such findings as applied to acts of *Congress*. *Id.* at 504, 109 S.Ct. at 727. Rather, the majority noted that state or *local* government entities cannot blindly rely on nationwide findings made by Congress as the basis for local race-conscious relief. *Id.* It does not follow, however, that Congress itself, when legislating for the benefit of the entire nation, cannot rely on its own hearings insofar as they establish a nationwide harm.

The limitation with respect to states and local governments set out in Croson is a recognition by the Court that state and local agencies must "also establish the presence of discrimination in their own bailiwicks . . . " *Id.* I conclude Congress may recognize a nation-wide evil, and act accordingly, provided the chosen remedy is narrowly tailored so as to preclude the application of race-conscious measures where it is not warranted.

Notably, in *Croson*, Justice O'Connor found that Congress had "explicitly recognized that the scope of the problem would vary from market area to market area," by including a waiver provision in the measures challenged in *Fullilove*. *Croson*, 488 U.S. at 504, 109 S.Ct. at 727. Justice O'Connor further observed that in making such findings, Congress "was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination." *Id.*

In sum, the congressional statements contested by Adarand are different in both character and authority

from those of the councilman in *Croson*. The record establishes that the statements by members of Congress were made after exercising the significant and well-recognized fact finding authority vested in that body. They were not the passing comments of a single legislator based on personal experience or popular perception. This, combined with Congress' constitutionally imposed role as the guardian against racial discrimination, leads me to attribute significantly more weight to the evidence in the Defendants' Appendix I than to that brushed aside in *Croson*.

I agree with Adarand that "blind judicial deference to legislative or executive pronouncements" is inappropriate in equal protection analysis. *See Croson*, 488 U.S. at 500-501, 109 S.Ct. at 725-726. However, while it would be improper to accept Congress' stated purpose with a nudge and a wink, it is not beyond the bounds of reason to examine the materials at Congress' disposal and recognize that Congress could have concluded legitimately that discriminatory racial barriers exist. A brief survey of the evidence submitted is instructive.

Appendix I states that, since the enactment of the SBA in 1978, Congress has often reexamined the issue of disadvantage in federal contracting caused by racial discrimination and found such disadvantage to continue. The appendix cites various hearings between 1978 and 1988 evidencing continuing difficulty experienced by individuals suffering from social and economic disadvantage in establishing small businesses after years of discrimination. (Defs.' Mem. Supp. Summ. J., App. I at 3-4.)

In 1988, Congress passed a substantial revision of the 8(a) program, 15 U.S.C. § 637(a), reaffirming its commitment to the elimination of discriminatory barriers faced by small businesses owned by disadvantaged individuals after a finding that discrimination and the effects of past discrimination continued to hinder their development. (*Id.* at 5-6.) The Defendants cite various congressional hearings between 1988 and the present in which Congress has received annual reports from the SBA revealing continued barriers for disadvantaged businesses in contracting and a continued need for remedial programs to address disparities between minority and non-minority businesses. (*Id.* at 6-8.)

Next, the appendix reflects after Congress enacted § 105(f) of STAA in 1982, establishing a 10 percent nationwide goal for subcontracting opportunities on federally assisted DOT mass transit and highway construction projects, it reauthorized the DOT DBE program in § 106(c) of STURAA. (*Id.* at 8-9.) The Senate Report accompanying the bill noted the committee had considered extensive testimony and evidence on the bill's DBE provision and concluded that this provision was necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industries. The report stated, despite progress, barriers remained "preventing minorities and women from successfully competing in the industry." (*Id.* at 9 (quoting S.Rep. No. 4, 100th Cong., 1st Sess. 11 (1987)).)

The DOT DBE provision was again reviewed by Congress and reauthorized in 1991 in ISTEA. (*Id.* at 8-9). That

authorization expires at the end of fiscal year 1997. Congress continues to hold hearings concerning barriers to DBE entry in the construction industry and has determined continuing remedial efforts are necessary. (*Id.* at 9-10.) The appendix also cites annual reports compiled by the Department of Commerce's Minority Business Development Agency bearing out Congress' continuing concerns over the difficulties DBEs have in securing federal procurement contracts. (*Id.* at 10-11.)

Attached to the amici brief are additional materials containing a non-exhaustive list of congressional hearings and reports on discrimination against disadvantaged businesses by private parties and various government agencies. (Mem. P. & A. Amici Curiae, App. at 1-5.) The appendix to the amici brief also refers to the "disparity studies" which have been conducted following *Croson* in almost every major city in the nation comparing actual utilization of minority owned businesses with availability levels, as required in that case. (*Id.* at 5-11.) The studies show a serious pattern of discrimination across all regions, including Denver, Colorado, and across a wide range of industries. (*Id.* at 5-8.) Finally, this appendix cites recent academic findings confirming disparate treatment of minority-owned businesses by commercial lenders. (*Id.* at 12-13.)

I am unpersuaded by Adarand's argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently represent "[s]ocietal discrimination, without more." *See Wygant*, 476 U.S. at 276, 106 S.Ct. at 1848. The record and chronological listing of hearings detailed in the amici appendix, reveal that Congress had

a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority business. Some of the most notable were "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *See Fullilove*, 448 U.S. at 467, 100 S.Ct. at 2769 (plurality opinion) (quoting U.S. Commission on Civil Rights, "Minorities and Women as Government Contractors," 16-28, 86-88 (1975)).

The holding in *Wygant* that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," 476 U.S. at 276, 106 S.Ct. at 1848, must be seen in context. *Wygant* concerned the validity of a racial preference protecting minority school teachers from layoff. *Id.* at 272, 106 S.Ct. at 1845-46. The preferences were created with the goal of remedying societal wide discrimination by providing "role-models" for minority schoolchildren. *Id.* Significantly, the only basis espoused by the defending school board for creating such a preference was societal discrimination itself. The Court rightly held that such a broad and categorical harm as "societal discrimination" could not, standing alone, create a compelling interest in imposing racial classifications.

In the circumstances of the instant case, however, Congress was not looking only to general, societal discrimination as the basis for the challenged programs. The evidence demonstrates that § 644(g) of the SBA and

§ 106(c) of STURAA are not based on the effects of such amorphous discrimination, but constitute a considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting.

Adarand contends much of the evidence submitted consists of "after action studies," that were not before Congress when it enacted the challenged measures. Such studies, it claims, are not sufficient to prove Congress had a compelling governmental interest before it proceeded to implement race-based measures. *See Shaw v. Hunt*, ___ U.S. ___, ___, 116 S.Ct. 1894, 1903, 135 L.Ed.2d 207 (1996) (holding "the institution that makes the racial distinction must have had 'a strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.' " (emphasis by the Court) (citing *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1848-49)).

I need not pass on the question of whether "after action" studies, standing alone, might ever present or document a pattern of long standing discrimination sufficient to create a compelling governmental interest in its eradication. I find, on the record before me, Congress had sufficient evidence, at the time these measures were enacted, to determine reasonably and intelligently that discriminatory barriers existed in federal contracting.

Unlike *Shaw*, this is not an instance where the legislature in question failed to consider "the historical events and social-science data that the [proffered] reports recount, beyond what individual members may have recalled from personal experience." *Shaw*, ___ U.S. at ___, 116 S.Ct. at 1903. To the contrary, Congress had ample

evidence from which to base its decision to adopt race-conscious relief.

To the extent that "after study" evidence exists, I need not ignore it. Indeed, the Tenth Circuit has held that post-enactment evidence may be properly considered along with pre-enactment evidence when performing strict scrutiny analysis. *See Concrete Works v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir.1994); *accord, Contractors Association v. City of Philadelphia*, 6 F.3d 990, 1004 (3d Cir.1993) (holding it especially appropriate to consider post-enactment evidence where the principal relief sought was an injunction).

The party defending remedial legislation bears the initial burden of production to show the program is supported by a "strong basis in evidence." *Wygant*, 476 U.S. at 277, 106 S.Ct. at 1849. However, the ultimate burden rests on the challenger "to demonstrate unconstitutionality of an affirmative-action program."[13] *Id.* at 277-78, 106 S.Ct. at 1849. I conclude Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a "compelling governmental interest." The issue remains whether the statutes and regulations are narrowly tailored to serve such interest.

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[13] The issue of the burden of proof is unclear. In *Plyler v. Doe*, the Court held: "With respect to such classifications [that disadvantage a 'suspect class' or impinge on the exercise of a 'fundamental right'], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." 457 U.S. 202, 217, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982).

B. *Narrow Tailoring.*

Under the strict scrutiny test, the use of race to award federal contracts must be narrowly tailored to serve a compelling interest. As mentioned, it is unclear whether Adarand has the burden of showing that the statutory and regulatory scheme is not narrowly tailored to serve a compelling governmental interest, as suggested in *Wygant*, or if the Defendants have the burden of showing that it is, as stated in *Plyler*.

In *Concrete Works*, the Tenth Circuit concluded the governmental entity must present evidence from which the court can conclude that the entity had a "firm basis for concluding that remedial action was appropriate." 36 F.3d at 1522. However, the challenger bears the ultimate burden of showing that the "evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted . . . was not sufficiently 'narrowly tailored.' " *Id.* at 1522-23 (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. at 1857 (O'Connor, J., concurring in part and concurring in the judgment)).

I note, after the majority in *Croson* found no compelling governmental interest had been established in that case, it observed it was "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." 488 U.S. at 507, 109 S.Ct. at 729. This language logically suggests, in the context of a program professing to remedy discriminatory barriers in federal contracting, the better identified those barriers are, the more likely it will be for a court to find the

measures enacted to eliminate those barriers are narrowly tailored.

I have concluded Congress need not make state-to-state nor city-to-city findings of discrimination before it can find a compelling interest in eliminating documented discriminatory barriers. The lack of such localized findings, however, necessarily requires that Congress exercise particular care in ensuring that its programs responding to such barriers are narrowly tailored.

The Court in remanding this case offered little guidance as to how a race-based remedial approach can be narrowly tailored, asserting only that the lower courts were to determine whether the SCC program "satisfies the 'narrow tailoring test' [the] Court has set out in previous cases," *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2117. I conclude it does not.

In *United States v. Paradise*, the Court mentioned five factors which may be relevant to the determination of whether an affirmative action remedy is narrowly drawn to achieve its goal: "(i) the efficacy of alternative remedies; (ii) the planned duration of the remedy; (iii) the relationship between the percentage of minority group members in the relevant population or workforce; (iv) the availability of waiver provisions if the hiring plan could not be met; and (v) the effect of the remedy upon innocent third parties." 480 U.S. 149, 187, 107 S.Ct. 1053, 1074-75, 94 L.Ed.2d 203 (1987).

In remanding the instant case, the majority alluded to related considerations to be confronted upon remand, namely, "whether there was 'any consideration of the use

of race-neutral means to increase minority business participation' in government contracting," *Adarand III*, 515 U.S. at 237-38, 115 S.Ct. at 2118 (quoting *Croson*, 488 U.S. at 507, 109 S.Ct. at 729), and "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effect it is designed to eliminate,' " *id.* (quoting *Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93). Justice O'Connor's observation that "unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses," also relates to the issue of narrow tailoring.

The subject SCCs were not themselves created by any act of Congress. Rather, they were instituted by the CFLHD as one means by which to comply with the congressional requirements in the SBA, STURAA, and ISTEA. As such, both the SCCs themselves and the authority under which they arise must be examined in determining whether the SCC program is a narrowly tailored measure that furthers the government's proffered interest of reducing discriminatory barriers in federal contracting.

Adarand charges the Defendants with misdirecting the attention of this court from the federal statutes serving as the basis and authority for the use of SCCs to the narrower scope of the SCCs themselves. It argues both the SCCs and the provisions in the SBA, STURAA, and ISTEA that cause and authorize their use are not narrowly tailored and do not survive strict scrutiny. I agree with Adarand that the Defendants focus to a greater extent on the SCCs themselves than on the larger picture presented by the congressional enactments.

Specifically, the Defendants argue that in *Fullilove*, the Court upheld the constitutionality of a program that required 10 percent of each contract to be set aside for DBEs. The Defendants assert the SCCs in this case are less restrictive in that they are optional and contain no goals, quotas, or set-asides. Moreover, under the SCC, prime contractors are free to accept bid proposals from any subcontractor, regardless of race or ethnicity. Thus, the Defendants suggest, since the SCCs are less restrictive than the program upheld in *Fullilove*, they should be upheld by this court. Finally, they argue, the majority in *Adarand III* specifically declined to overrule *Fullilove's* "most searching examination" standard, applied when the Court found the arguably less tailored measures in the Public Works Employment Act to be constitutional.

The attempted comparison with *Fullilove* is of limited value in the analysis of the SCCs and the statutes from which they originate. Justice O'Connor stated specifically that, "to the extent (if any) that *Fullilove* held federal racial classifications to be subjected to a less rigorous standard, it is no longer controlling." *Adarand III*, 515 U.S. at 235, 115 S.Ct. at 2117. The dissents of Justices Stevens and Souter also suggest the majority rejected an argument that *Fullilove* controls the analysis here.[14]

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[14] Justice Stevens wrote: "[O]ur obligation to give deference to Congress' policy choices is much more demanding in this case than it was in *Fullilove*. If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell's vision of the Constitution . . . the Court endorses today . . . it must follow . . . that the Court of Appeals' judgment upholding this more carefully crafted program should be affirmed." *Adarand*, 515 U.S. at 264, 115 S.Ct. at 2130 (Stevens, J., dissenting). Justice Souter stated succintly "[t]he statutory scheme must be treated as constitutional if *Fullilove v. Klutznick* . . . is applied." *Id.* at 265, 115 S.Ct. at 2131 (Souter, J., dissenting).

Although the Defendants are correct that the standard applied in *Fullilove* upheld the provisions in the Public Works Employment Act at issue in that case, the majority in *Adarand III* stated it "need not decide whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it." 515 U.S. at 235, 115 S.Ct. at 2117. Because the Court expressly declined to answer this question, I view with caution any comparison between the measures upheld in *Fullilove* and those at issue here.

Adarand contends the SCCs and the relevant statutes and regulations, are not narrowly tailored because the SCC program is not optional. It contends Congress has clearly mandated that its agencies award a certain percentage of federal contracts to groups certified under the race-based presumptions. Citing extensively from the relevant statutes and regulations, Adarand asserts their language demonstrates the use of race-based preferences is mandatory. For example, § 637(d) of the SBA states "[t]he contractor *shall presume* that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. . . . " 15 U.S.C. § 637(d)(3)(c) (emphasis added). Section 644(g) of the SBA states: "The President *shall annually establish Government-wide goals* for procurement contracts. . . . The Government-wide goal

. . . *shall be established* . . . at not less than 5 percent. . . . " 15 U.S.C. § 644(g) (emphasis added).

Both STURAA and ISTEA provide "not less than 10 percent of the amounts authorized . . . *shall be expended* with small disadvantaged concerns. . . . " STURAA, § 106(c), P.L. 100-17, ISTEA, § 1003(b), P.L. 102-240 (emphasis added). If the CFLHD fails to meet the goals established by and pursuant to the statutes, the Division Engineer "receives a chat from his supervisor." (Robinson. Dep. at 45, lines 6-20).

Adarand points out the SCCs themselves must be included in every contract let by the CFLHD, except those let under the explicit set-asides created by the SBA's 8(a) program. It contends the extra financial "bonus"- incentives provided by the SCC causes prime contractors like Mountain Gravel to use DBEs instead of taking lower bids from non-DBE contractors.

The Defendants strenuously oppose Adarand's characterization of the payments authorized by the SCCs as a "bonus" paid to prime contractors for discriminating in favor of DBEs. They claim the SCCs are "compensation" by their very terms, and are designed to compensate prime contractors for the additional sums they may have to expend as a result of hiring DBEs.

Drawing all inferences from the record in the light most favorable to the Defendants, I find in certain circumstances, including those before me, the SCC payments do in fact serve as a "bonus." The SCC states "[c]ompensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified in the transportation facilities construction

field." (Pl.'s Mot. Summ. J., Ex. A at I-25.) Further, "[t]he Contractor shall maintain records documenting these activities and shall make them available for Government review upon request."[15] *Id.* There is no requirement that a prime contractor expend any funds for the purpose of locating, training etc. Nor is there any provision for adjustment of the amount awarded to a prime contractor if utilization of a particular DBE involves no such extra expenditure.

The SCC requires the contractor to furnish a certified copy of records supporting final amounts paid to or on behalf of DBE subcontractors. However, this phrase cannot be read as requiring documented "extra" expenditures to support DBEs before the prime contractor can be paid under the SCC. Rather, it seems designed to document the contract amount, or money paid to the subcontractor under its bid, probably for the purposes of calculating the amount of compensation the prime contractor will be paid under the SCC. Clearly, the SCC awards additional payment, even in the absence of any additional cost incurred by the prime contractor with regard to its subcontracting to a DBE.

Here, the record indicates retaining Gonzales, a DBE, did not impose any additional cost upon Mountain Gravel. To the extent an SCC payment acts as a gratuity for a prime contractor who engages a DBE, it cannot be said to be narrowly tailored to the government's interest

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[15] The Defendants do not dispute that the CFLHD has never requested nor reviewed the reports required of the prime contractors so as to document any efforts made by them to "locate, train, utilize, assist," and develop DBEs.

of eliminating discriminatory barriers. Rather, this aspect of the SCC results in the spending of public funds in a way "which encourages, entrenches, subsidizes, or results in racial discrimination," *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 790, 39 L.Ed.2d 1 (1974). Where subcontracting to a DBE does not cause an increase in costs, the prime contractor receives additional payment because of a choice based only on race.

Adarand further argues the program at issue is not narrowly tailored because of the random or haphazard presumption of disadvantage available to racial groups that may never have suffered from discrimination in the construction industry, i.e. that it is over inclusive. *See Croson*, 488 U.S. at 506, 109 S.Ct. at 728. For example, Adarand states, there is no evidence that Aleuts, Samoans or Bhutans have been discriminated against in the Colorado construction industry.

The Defendants respond that nothing in *Adarand III*, *Wygant*, or *Croson* suggests that Congress must make such state-by-state findings. Rather, they assert, persons belonging to the groups deemed by Congress to be socially and economically disadvantaged in the United States because of their race or ethnicity are entitled to this presumption anywhere in the United States, being Congress' domain of legislative jurisdiction.

I agree that Congress' national jurisdiction allows it, where appropriate, to determine that discriminatory barriers exist with reference to specific groups. However, before making such determination, the requirement of narrow tailoring mandates that Congress "inquir[e] into whether or not the particular [entity] seeking a racial

preference has suffered from the effects of past discrimination. . . . " *Croson*, 488 U.S. at 508, 109 S.Ct. at 729 (distinguishing its facts from those in *Fullilove*).

Contrary to the Court's pronouncement that strict scrutiny is not "fatal in fact," I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as reason.

The statutes and regulations governing the SCC program are overinclusive in that they presume that all those in the named minority groups are economically and, in some acts and regulations, socially disadvantaged. This presumption is flawed, as is its corollary, namely that the majority (caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive.

The Defendants argue the SCC has safeguards to ensure that only bona fide DBEs may participate and asserts the CFLHD relies on the Colorado State certification process.[16] They enclose the application forms currently used by the Colorado Department of Regulatory

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[16] As noted, Colorado follows the guidelines in 49 C.F.R. part 23 in making such certification decisions. In so doing, it makes "a rebuttable presumption that individuals in the [specified] racial groups are socially and economically disadvantaged." *See* 49 C.F.R. § 23.62 (1995).

Affairs (DORA). According to the Defendants, Frankie Gonzales was found to be socially and economically disadvantaged because he was Hispanic and his firm met the size standards for certification. The forms submitted by the Defendants set out the mandates of 49 C.F.R. part 23 (1995) and require a substantial amount of information concerning the applicant, including information about racial background and the applicant's gross revenues and property holdings. These eligibility criteria, the Defendants submit, render the program narrowly tailored.

These recent forms are, however, significantly more extensive in their probing than those used when Gonzales first obtained DBE certification from the Colorado Department of Highways in 1985. The earlier forms have been substantially revised. The forms completed by Gonzales are centered almost exclusively on the question of ethnicity, inquiring about minority ownership percentages, and the race of the applicant. (Pl.'s Second Supp. Exs., Ex. K.) They ask whether the applicant firm is "owned and controlled by socially and economically disadvantaged individuals." If so, the firm is required to attach its certification from the SBA's 8(a) program to that effect. Gonzales, when marking the form checked "no" for this question, apparently because he was not certified as an 8(a) participant at that time.

Adarand also attaches the form used by the State of Colorado when it made its certification of Gonzales based on the forms he submitted. It supports a finding that Gonzales was certified solely because of his race. The first question asks the certifying authority to state if, based on the data furnished, the applicant is or is not "an eligible

concern." It then requires justification for this determination. On the form pertaining to Gonzales, the entire justification section reads: "Gonzales Construction is a 100% minority owned firm." (Pl.'s Supp. Exs., Ex. K.)

Both the race-centered forms actually used in Gonzales' DBE certification, and the later more inquiring forms submitted by the Defendants, sufficed for certification purposes under the STURAA regulations and the relevant SBA, STURAA, and ISTEA percentage goal provisions. This supports a conclusion that the presumptions of disadvantage set out in federal statutes and regulations are not narrowly tailored to those who have suffered the effects of prior discrimination in that they allow implementation in such a way as to permit an absolute preference to certain business entities based solely on their race.[17] *See Croson*, 488 U.S. at 507-509, 109 S.Ct. at 729-730.

I conclude the statutes and regulations implicated in the SCC program, with respect to the races included as presumptively disadvantaged, do not provide a reasonable assurance that the application of racial criteria will be limited to accomplishing the remedial objectives of Congress. *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779-80. As such, they are not narrowly tailored to serve the interest of eliminating discrimination in the construction industry.

Justice O'Connor drew attention to the issue of whether the differences in the statutes and regulations implicated in the SCC program are relevant to a strict

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[17] Indeed, under these standards, the Sultan of Brunei would qualify.

scrutiny analysis. *See Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. In my opinion, these disparities further indicate a lack of narrow tailoring.

As the Court noted, the SBA's 8(a) program mandates an individualized inquiry into each participant's economic disadvantage, *Adarand*, 515 U.S. at 237, 115 S.Ct. at 2118 (citing 13 C.F.R. § 124.106(a) (1994)). On the other hand, the DOT regulations implementing STURAA § 106(c) do not require the certifying authorities to make such individualized inquiries. *See* 49 C.F.R. § 23.62 (1994); 49 C.F.R. pt. 23, subpt. D, App. C (1996).

A similar contradiction exists between various regulations implementing the 8(d) program. Some require 8(d) participants to make the individualized showing applicable to 8(a) participants, although the standards applicable to the factors considered for 8(d) "are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program." 13 C.F.R. § 124.106(b) (1996). Others, however, allow potential 8(d) participants to avail themselves of the race-based presumption for social and economic disadvantage. *See* 48 C.F.R. 19.703(a)(2) (1996).

Further inconsistencies exist between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs. Whereas, to participate in the 8(a) program, the individual's ability to compete must have been impaired "as compared to others in the same or similar line of business who are not socially disadvantaged," 13 C.F.R. § 124.106(a)(1)(i) (1996), under § 124.106(b)(1), an 8(d)

participant need show such impairment only "as compared to others in the same or similar line of business," 13 C.F.R. § 124.106(b)(1) (1996).

The inconsistencies between these statutes and regulations and the resultant uncertainty as to who may or may not participate in the race-based SCC program preclude a finding of narrow tailoring. As discussed in relation to the different forms which have been used in the certifying process, without a well defined set of consistent definitions, the SCC program cannot provide the "reasonable assurance that the application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively." *See Fullilove*, 448 U.S. at 487, 100 S.Ct. at 2779.

Justice O'Connor also raised the issue of whether race-neutral means were considered before the enactment of the race-based program. *Adarand III*, 515 U.S. at 237, 115 S.Ct. at 2118. Adarand contends they were not. The Defendants respond the CFLHD implements § 644(g) of the SBA and § 106(c) of STURAA. They argue, before enacting the challenged statutes, Congress required the use of race-neutral measures but considered them an insufficient response to address discrimination against minorities in the highway construction business. Moreover, the Defendants maintain race-neutral mechanisms remain in place and the SCC is supplementary to those measures.

The Defendants submit Congress utilized race-neutral measures for at least twenty-five years before amending the SBA in 1978. In 1953 it passed the SBA, allowing the Small Business Administration to enter into contracts with the federal government and subcontract them out to small businesses. However, the Defendants state, in the ensuing fifteen years, minority-owned small businesses continued to be disproportionately excluded from government procurement. As a result, Congress authorized the Small Business Administration to subcontract to socially and economically disadvantaged businesses in an attempt to help minority-owned small businesses. In 1970, to help small businesses obtain surety bonds, the Small Business Administration was authorized by the Housing and Urban Development Act, Pub.L. 91-609, 84 Stat. 1813, 15 U.S.C. § 694a and b, to establish the Surety Bond Guaranty Program. This program covered surety companies for up to 90 percent of their losses on bonds. By 1975, however, the General Accounting Office reported that the "SBA's success in helping disadvantaged firms to become self-sufficient and competitive has been minimal." Library of Congress, Congressional Research Service, Minority Enterprise and Public Policy 53 (1977).

The Defendants assert Congress' 1978 reform of the SBA was based on the ineffectiveness of race-neutral measures in helping minority owned firms overcome the discriminatory barriers in federal procurement. Therefore, they argue, the § 644 goals were established only

after Congress determined that the race-neutral alternatives used before the 1978 amendments were not successful in opening opportunities for small disadvantaged businesses.

The Defendants also maintain Congress was aware that numerous other legislative and executive branch remedies, such as anti-discrimination legislation, executive action to remedy employment discrimination in federal contracting, and federal aid to minority businesses, had failed to eradicate discriminatory barriers. For example, minority contractors received less than 1 percent of federal contracts in 1977. 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke). Congress determined this was likely the product of discriminatory barriers. H.R.Rep. No. 94-468 at 1-2 (1975). *See Fullilove*, 448 U.S. at 511, 100 S.Ct. at 2791 (Powell, J., concurring) ("[B]y the time Congress enacted [the 'minority business enterprise' ('MBE') set-aside], it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry"); and at 465-67, 100 S.Ct. at 2768-2769 (Burger, C.J. concurring) (finding that Congress had carefully examined and rejected race-neutral alternatives before enacting the MBE set aside).

In its discussion of narrow tailoring, the *Croson* Court found there did not "appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting." 488 U.S. at 507, 109 S.Ct. at 729. This suggests that there must have been an attempt in the industry in question to use race-neutral measures to eliminate racial barriers to minority participation. *Croson* acknowledged, without criticism, however, the findings of the principal opinion in *Fullilove*

that Congress had examined and rejected race-neutral measures in the construction industry before enacting the MBE set aside. This approach recognizes Congress' ability to legislate nationwide to address nationwide programs. Based on the numerous congressional records cited by the Defendants here and by the Court in *Fullilove*, I conclude Congress' earlier race-neutral measures sufficed to pass this aspect of strict scrutiny muster.

Adarand further contends the SCC program is not narrowly tailored because "[t]he race-based program at issue in this case awards between 10 and 18 percent of all federal highway construction contracts on the basis of race." (Mem. P. & A. Supp. P1's. Mot. Summ. J. at 19.) Adarand cites no authority for these "goals," which, it maintains, bear no relationship to the number of available DBEs. Their only justification, according to Adarand, is "outright racial balancing."

Adarand relies on Justice O'Connor's remarks in *Croson* that "the 30% quota cannot be said to be tailored to any goal, except perhaps outright racial balancing. It rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507, 109 S.Ct. at 729. Justice O'Connor was here rejecting the City of Richmond's adopted plan requiring prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more "Minority Business Enterprises."

The Defendants argue, unlike in *Croson*, here the SCC has no project goals, set asides or quotas and a primary

contractor is not mandated to make subcontract awards based on race. With respect to contracts containing the SCC, they assert, there is no requirement that primary contractors make subcontractor awards based on the race of the bidder. They maintain in over 87 percent of the contracts containing the SCC awarded in Colorado from the time of the West Dolores project to the date of the filing of the Defendants' motion, the prime contractor did not avail itself of the compensation offered by the SCC. (Defs.' Mot. Summ. J., Ex.5.)

The SCC itself imposes neither goals nor quotas. A prime contractor has the choice to subcontract work to DBE's, and thus qualify for the benefits of the SCC, but is not required to make such choice. This is more flexible than the "rigid racial quota" struck down in *Croson*, 488 U.S. at 499, 109 S.Ct. at 724-25 and the 10 percent set aside upheld in *Fullilove*, 448 U.S. at 513-14, 100 S.Ct. at 2792-93. Nevertheless, the use of the SCC is one means by which the government implements the statutory directives of the SBA, (requiring the President annually to establish Government-wide goals for participation by DBE's procurement contracts, at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year), 15 U.S.C. § 644(g), and STURAA and ISTEA (mandating that not less than 10 percent of the amounts authorized to be appropriated under the acts be expended with small disadvantaged concerns), STURAA, § 106(c), P.L. 100-17 (1987), ISTEA, § 1003(b), P.L. 102-240 (1991). *See Adarand III*, 515 U.S. at 204-07, 115 S.Ct. at 2102-03.

Thus, although the SCCs contain no quotas, they are used as one of the methods to attain the percentage goals

in the SBA, STURAA and ISTEA, and are thus inextricably linked with these goals. Insofar as the percentage goals are a foundation for the use of the SCCs, rooted in the same race-based presumptions contained in the SCCs, I find the statutory sections containing those goals insufficiently narrowly tailored for the same reasons as I stated in making that determination regarding the SCCs themselves.

Finally, Adarand states the remedial measures enacted by Congress and implemented by the Defendants are not "narrowly tailored" because they are "unlimited in scope and duration." The Defendants respond the appropriate inquiry is whether the challenged measures have been regularly reviewed to determine whether they are still needed. *See Fullilove*, 448 U.S. at 489, 100 S.Ct. at 2780.[18] They state, since 1982, Congress has regularly reviewed and reassessed STAA, STURAA and ISTEA and retained DBE provisions although in 1987, STURAA's 10 percent goal for DBE participation was modified to include women-owned businesses. The citations in Appendix I, the Defendants assert, reflect numerous hearings before congressional committees and congressional committee reports which show Congress has overseen the operation of these programs to determine whether they are working as intended and has concluded that continuing remedial efforts are needed. The Defendants note, unless Congress makes a further determination of need,

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[18] Notably, the regulations governing the 8(a) program limit participation therein to nine years from the date of certification and provide for premature termination for good cause.

the DBE program for highway and transit programs is scheduled to lapse at the end of fiscal year 1997.

The Defendants assert, under 15 U.S.C. § 644(g), government-wide goals are negotiated annually between the head of each agency and the Small Business Administration. They state Congress has reviewed evidence to determine whether the goals are achieving the desired result of remedying discrimination and the lingering effects of past discrimination nationwide and has determined there is a need to continue the DBE requirements of § 644(g).

When and in what circumstances, the SCC program will end seems unclear. However, because I have not found the SCC program to be narrowly tailored based on other relevant factors, I need not rule on the issue of whether the limitations stressed by the Defendants sufficiently ensure that the program "will not last longer than the discriminatory effect it is designed to eliminate." *See Fullilove*, 448 U.S. at 513, 100 S.Ct. at 2792-93.

Finally, relevant to the issue of narrow tailoring, is the degree of burden placed on nonminority businesses by the SCC program. The Defendants note the SCC might have the effect of providing DBEs with contracting opportunities that otherwise might have been available to non-DBEs, but that this incidental consequence does not render the SCC provision constitutionally defective as applied to Adarand. In this regard, the Defendants cite *Fullilove:*

> When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible. The actual

> "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.

448 U.S. at 484, 100 S.Ct. at 2778 (citations and footnote omitted).

The Court's declaration in *Fullilove* was that such incidental burden may be permissible provided that it occurs in the course of executing a properly tailored remedy. Since I find the SCC program is not properly tailored, I do not reach the issue of assessing the relative burden shouldered by nonminority firms through its implementation.

VII. *Conclusion.*

For the aforesaid reasons, I conclude the SCC program at issue does not survive strict scrutiny. I therefore grant Adarand's motion for summary judgment, and deny that of the Defendants. Accordingly,

IT IS ORDERED THAT § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. §§ 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the subcontracting compensation clause program arising pursuant to those statutes and regulations, are unconstitutional as applied to highway construction in the State of Colorado and thus deprive Adarand Constructors, Inc. of its constitutional rights;

IT IS FURTHER ORDERED THAT the Defendants are enjoined from administering, enforcing, soliciting bids

for, or allocating any funds under the said subcontracting compensation programs.